IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 11/04/2003

Coram

THE HONOURABLE MR. JUSTICE K.P.SIVASUBRAMANIAM

ELECTION PETITION No.6 of 2000

R.Thirumavalavan .. Petitioner

-Vs-

1.Sumathi Udayakumar

2.E.Ponnuswami

3.R.Ganagasabai

4.V.Kamaraj

5.D.Muruganandham

6.The Returning Officer,
Chidambaram Parliamentary
Constituency, Collectorate,
Cuddalore District. .. Respondents

(R.6 deleted as per the order of this
Hon'ble Court (K.P.S.,J.) dt.3.4.2002).

This Election Petition is filed under Sections 80 and 81 read with Sections 100(1)(b), 100(1)(d)(iv), 101 and 123 (7) read with 136 of the Representation of the People Act, 1951 praying to declare the election of the second respondent to the 13th Lok Sabha from Chidambaram (SC) Parliamentary Constituency as null and void and to declare the petitioner as duly elected candidate for the above Constituency.

!For Petitioner : Mr.G.Subramaniam,
Senior Advocate for
M/s.K.Balakrishnan and
another.

^For Respondent-2 : Mr.R.Thiyagarajan,
Senior Advocate for
M/s.D.Gubendragunabalan
and M.Muthappan

For Respondents-1&4 : Exparte.

For Respondents-3&5 : No Appearance

:O R D E R

In this election petition, the petitioner/defeated candidate questions the election of the second respondent in the general elections held for the 13th Lok Sabha, for Chidambaram (S.C. Parliamentary Constituency).

2. The Election Commissioner of India on 11.7.1999 announced the schedule of election as follows:-

Date of commencement of final nomination 11.8.1999.
Last date for filing nomination 18.8.1999.
Date of agreeing of nomination 19.8.1999.
Last date for withdrawal 21.8.1999
Date of polling 5.9.1999.

3. The petitioner being the convenor of Dalit Panthers of India contested the elections with the alliance of Tamil Manila Congress in Cycle symbol. He filed his nomination on 18.8.1999 for contesting in Chidambaram (SC Parliamentary Constituency), before the 6th respondent. The respondents 1 to 5 also filed their nominations. The second respondent was set up by Pattali Makkal Katchi (P.M.K.). After scrutiny of nominations, six candidates were declared as contestants.

4. After elections, counting of votes commenced on 6.10.1999 and the second respondent was declared as successful candidate for the Parliamentary Constituency. The respective candidates were declared to have secured the following votes:-
1. Sampath Udhayakumar 1,50,794
2. Thirumavalavan (Petitioner) 2,25,768
3. Ponnusamy (second respondent) 3,45,331
4. Kanagasabai 422
5. Kamaraj 384
6. Muruganandham 1,606

Total valid votes 7,24,305
Total votes polled 7,32,994
Total rejected votes 8,689
Total valid votes 7,24,305

5. The petitioner submits that the election to the said Constituency has to be declared as void as the result of the election having been materially affected on account of various material irregularities alleged to have been committed by the second respondent. He also alleges non-compliance of the mandatory provisions of the Representation of the People

Act, hereinafter called the Act, the Conduct of Election Rules, the instructions given to the Returning Officers and the guidelines issued to the candidates. The hand book to the Returning Officers as well as candidates have been issued under authority of law by the Election Commission of India. The petitioner further contends that in terms of the provisions under Section 15 of the Representation of the People Act, 1950, there shall be an electoral roll for every Constituency, prepared in accordance with the Act Rules. Section 18 provides that no person shall be entitled to be registered in the electoral roll for any Constituency more than once. Under Section 19, every person who is ordinarily a resident in the Constituency shall be entitled to be registered in the electoral roll for that Constituency. In terms of Section 33 of Representation of People Act, 1951, the requirements for filing nomination papers are stated and under Section 33 (2), procedure for reservation of seats and the qualifications for a candidate are prescribed. In the case of a member claiming to be a Scheduled Caste or Scheduled Tribe of the State, a declaration is sought for. The second respondent is a registered voter in Villivakkam Assembly Segment which is one of the segments in the North Madras Parliamentary Constituency. If he is a voter of North Madras Parliamentary Constituency, the law prohibits him from exercising his franchise or casting his vote in any other Constituency. If the voter votes in a different Constituency, he would be guilty of electoral offence punishable under the relevant provisions of the Act and the Indian Penal Code. It is also known fact that a voter cannot exercise his vote in a Constituency other than the one in which he is registered as a voter. It is also further stated that such voting cannot be made without the actual connivance and assistance of the Presiding Officer or the Assistant Presiding Officer. When a Presiding Officer or other electoral staff in charge of a particular booth does something prohibited by law, they would not be discharging the functions enjoined on them, by law. The second respondent knowing fully well that he is not a registered voter in Chidambaram, SC Parliamentary Constituency and knowing fully well that he is not one of the voters in polling booth No.4 2 situated in Government Arts College, Virudhachalam, forcibly entered the polling station accompanied by his partymen and attempted to cast a vote. According to the petitioner, the Presiding Officer abetted with the second respondent and succumbed to the force and had allowed the second respondent to cast a vote in that booth. The said action on the part of the second respondent and the Presiding Officer of the said booth was totally irregular and illegal. The second respondent had thereby interfered with the normal electoral process and had coerced the officials to adulterate the election. The Presiding Officer, being a person appointed to discharge the duties under the Representation of People Act must have high commitment to the Rule of Law regardless of personal interest and not to yield to any pressure from inside or outside the Government. He is answerable to the rule of law alone. The action of the Presiding Officer in circumventing the rules to the advantage of the second respondent, was a danger to the democracy and to the rule of law. The action of the second respondent in coercing and enlisting the support of the Presiding Officer and other persons in order to cast the vote in Virudhachalam booth was nothing but a clear, voluntary and wilful violation of the mandatory provisions of the Representation of People Act, 1951 and the conduct of Election Rules, 1961. This is nothing but a clear commission of corrupt practice by the second respondent. As contemplated under Section 123

(7), the conduct on the part of the Presiding Officer in allowing the second respondent to vote in that booth was a clear instance of obtaining his assistance and for the furtherance of the prospects of the candidate.

6. It is further stated that the conduct of the second respondent in procuring the assistance of the Presiding Officer and casting a vote was a material irregularity, materially affecting the election process. The same also amounts to non-compliance of the provisions of the Constitution and the provisions of the Act and other rules, orders and guidelines contained in the Hand book issued to the Returning Officers. The action on the part of the second respondent had resulted in premium to the high handedness of the second respondent, various other voters, agents and partymen belonging to the second respondent. The fact that the second respondent had cast his vote at Virudhachalam Arts College, despite not being a voter, spread like wild fire and had emboldened partymen belonging to the second respondent who indiscriminately entered the polling booths and had cast votes improperly and the same was done with the active assistance of the Presiding Officer.

7. The petitioner further submits that the 1st respondent had filed a complaint with the Election Commission of India and also by the Communist party (Marxist, Cuddalore). Its District Secretary also lodged a complaint with the Election Commissioner. Similar complaints were filed before the Electoral Officer and before the Chief Election Commissioner of India on 22.10.1999. The petitioner further contends that the Election Commission of India had called for a report from the Chief Electoral Officer, Tamil Nadu and to take disciplinary and criminal action against the Presiding Officer of the said booth. The District Collector had also initiated disciplinary action against the Presiding Officer. However, no order has been passed by the Election Commissioner. The second respondent has without any due authority received the ballot paper from the Presiding Officer and had put the said ballot paper in the ballot box, which is not authorised under the law. Without any due authority he had interfered with the ballot box and he had fraudulently committed the said illegal Act wilfully and the Presiding Officer of the polling booth had also abetted the same resulting in irregularities. The second respondent was therefore guilty of electoral offences under Section 136 (d) (e) (f) (g) of the Representation of the People Act and is liable to be punished under Section 1 36 (2) (b) of the Act. He has also committed offences under Section 1 71 (c) (d) of the Indian Penal Code and punishable under Section 171 (f).

8. The petitioner further contends that his Chief Election Agent Mr.Vinayagamoorthy also lodged a criminal compliant with the Virudhachalam Police Station on 30.10.1999. He requested the Inspector of Police to take the complaint on file and investigate the same and to take appropriate proceedings. In the news papers also, the news item relating to the conduct of the second respondent were published in detail. In the "Hindu" dated 17.10.1999, it was also reported that action was being taken by the Chief Electoral Officer against the Presiding Officer and that the voter was allowed to vote by the Presiding Officer on the strength of his statement that the Revenue Divisional Officer, Ponneri, who is the Electoral Registration Officer of the Villivakkam Assembly segment had informed him that he can vote

anywhere on the basis of the extract of the electoral roll of that assembly segment. Various political parties have also issued statements demanding action to be taken against the second respondent for having deliberately infringed the provisions of the Act and Indian Penal Code.

9. Petitioner further submits that the fact that he had voted at Virudhachalam in the said booth is not disputed by the second respondent himself. He has admitted his action by giving a statement to the Press. The said statement of the second respondent was published in " Dinamalar" dated 18.10.1999. It was also revealed that the second respondent has stated that he was a voter in the Villivakkam Assembly segment and that the Revenue Divisional Officer, Ponneri has given a Certificate to that effect, which he had shown to the Presiding Officer of the booth at Virudhachalam. It was only on showing the said Certificate, he was allowed to vote in the said booth and therefore he has not committed any wrong, according to the statement of the second respondent. In the "Hindu" published on 20.10.1999, it was reported that the Election Commission has received a detailed note from the Chief Electoral Officer of Tamil Nadu on the episode and that the second respondent has been allowed to vote in a polling booth even though his name was not found in the voters list. It was further reported that the Chief Electoral Officer of Tamil Nadu had initiated action against the Presiding Officer of the booth where the second respondent had exercised his franchise.

10. The petitioner further submits that the second respondent himself has admitted that he had voted in Virudhachalam and thus in law it amounts to an admission by the second respondent and he was thus guilty of committing an offence under Section 136 of the Representation of People Act and 171 (c) (d) of the Indian Penal Code and punishable under Section 171 (7) of the Act.

11. The petitioner further states that the election of the second respondent was vitiated under Section 100 (1) (b) and also Sections 10 1 (d) (iv) besides being guilty of the offence under Section 136 of the Act and therefore his election must be declared as invalid. While the second respondent has secured 3,45,331 votes, the petitioner has secured 2,25,768 votes. The petitioner had conducted himself within the frame work of law and had scrupulously followed the provisions of the Constitution and the Act and the conduct of Election Rules.

12. The petitioner further contended that in view of the fact that the election of the second respondent was liable to be set aside under Section 100 of the Act, he had prayed that this Court may declare election of the returned candidate to be void and under Section 101 of the Act that the petitioner who came second has to be declared as elected from Chidambaram (SC Parliamentary Constituency). The petitioner also claims to have complied with all the requirements and ultimately he had prayed for declaration that the election of the second respondent was null and void and to declare that the petitioner was the duly elected candidate to the Constituency.

13. The second respondent herein, filed an application under Section 83 (1) (a) and 88 of the Representation of the People Act, the

Application No.O.A.58 of 2001 seeking for striking out the allegations contained in paragraphs 8 to 11, 14, 16 to 21 in the election petition. A detailed affidavit in support of the said petition was also filed by the second respondent. A counter was filed by the election petitioner.

14. This Court after hearing both parties and after having dealt with the issues in detail by order dated 19.10.2001, partly allowed the said application only to the extent of striking out paragraph 23 alone. In other respects, the said application was dismissed and the election petition was directed to be taken up for trial on 2.11.2001.

15. After the disposal of O.A.No.58 of 2001 on 19.10.2001, the second respondent filed his written statement on 30.10.2001. The second respondent pleaded as follows.

16. Under the provisions of Representation of People Act, hereinafter called the Act, an election can be called in question only by election petition and filed in accordance with Chapter-2 of the Act. The grounds on which the petition can be filed are set out under Section 100 of the Act. In the event of any allegation of improper reception or rejection of any vote or reception of an y vote which is void, then the pleadings must clearly state that the election in so far as the respondent was concerned had been materially affected. There are no pleadings to the said effect. One of the grounds available under Section 100 for declaring the election as void is the commission of corrupt practice by a returned candidate. Such corrupt practices should be confined to Section 123 of the Act. Except for referring to Section 1 23(7), the election petition does not set out the material facts or particulars of ingredients of the corrupt practice. Though the requirements under Section 123(7) are very clear and specific, the election petition does not set out the material facts as to whether and how the respondent is said to have obtained or procured for the furtherance of the prospects of his election, any assistance from any person in the service of the Government. The allegation in the said regard was vague, indefinite and imaginary. Under Section 136 (d), if any person without authority receives or supplies any ballot paper or is in possession of any ballot paper, such a person will be guilty of an electoral offence. The allegations in the election petition do not satisfy the requirements under Section 136 (d). Section 136 (e) makes the person guilty of offence if he fraudulently puts into the ballot box anything other than the ballot paper. Here again in the election petition no proper allegations have been stated to satisfy the ingredients under Section 136 (e). The allegations do not fall either under Section 136 (d) or under Section 136 (e). The various allegations in the election petition do not make out a case of corrupt practice under 1 00 (b) of the Act. Assuming that the allegations are sufficient to make out a case under Section 123(7) and under Section 100 (b), in the absence of material facts and particulars as to how the result of the election has been materially affected, there is no ground for challenging the election. Out of the total polled votes of 7,32,994, the respondent had secured 3,45,331 votes and won the election with a difference of 1,19,563 votes. When this respondent went to polling booth No.42 on 5.9.1999, he was fully aware that his name was not in the electoral roll. He had with him a certified copy of the voters list

pertaining to Villivakkam Assembly segment of North Madras Parliamentary Constituency. The Presiding Officer in the booth asked whether he is a voter in the voters list of the booth. The respondent gave a categorical reply that he is not a voter and he also showed to him the certified copy of the voters list relating to Villivakkam Assembly segment. The Presiding Officer then pointed out to the respondent that he can cast is vote in that Constituency in booth No.42, if he is a voter in some other place. The respondent did not procure or obtain or did anything to obtain the assistance from the Presiding Officer of booth No.42 for the furtherance of the prospects of his election. The said Presiding Officer has also given an affidavit to the effect that he permitted this respondent to cast his vote in booth No.42. Assuming that such permission was an improper reception, in the absence of any material fact of any material particulars as to how the result had been materially affected by such reception, the petitioner has no ground to challenge the election. The permission granted by the Presiding Officer will not amount to a corrupt practice. The alleged electoral offence in paragraph-7 of the petition was misconceived. The allegations do not set out the electoral offence alleged to have been committed by the respondent. The further contention that a voter in a Constituency cannot exercise his vote in a different Constituency without the active support and connivance and assistance of the Presiding Officer and the election staff, are vague, general and indefinite. There is no allegation that any particular Officer or election staff for having supported the respondent or for having connived with him and assisted him in casting his vote. The contention that the respondent forcibly entered booth No.42 was false. He never attempted to cast his vote in the said booth. He did not ask the Presiding Officer whether he could vote in the booth nor he did seek his assistance in that regard. Therefore, there was no question of the Presiding Officer having abetted the respondent in casting of the vote in the booth. There is no basis for the contention that he had interfered with the normal electoral process and had coerced the officials to adulterate the election process. He did not also enlist the support of the Presiding Officer or the other persons in the booth for casting the vote.

17. The respondent further states that it is not alleged as to how and in what manner and at what point of time the assistance of the Presiding Officer in booth No.42 was procured. It was mischievous to allege that the casting of the vote by the respondent in booth No.42 had materially affected the election process. There is no basis for the allegation that number of voters who were not registered in the Constituency had voted in Chidambaram (SC Parliamentary Constituency). No facts and circumstances have been alleged. As regards the complaints which are alleged to have been made against the respondent, the petitioner has not alleged the details or the gist of the complaints alleged to have been made against the respondent. The respondent further states that he understands it to be true that the Election Commission of India declined to interfere with the complaints made by the petitioner. The allegation as if on 5.9.1999, he had entered the polling booth without due authority and had received the ballot paper from the Presiding Officer and fraudulently put it into the ballot box were incorrect and misleading. The respondent did not commit any fraudulent Act. It was incorrect to allege that the respondent was allowed to vote by the Presiding Officer on the strength of the statement that the Revenue Divisional Officer

had informed that this respondent that he can cast his vote anywhere on the basis of the extract of the voters list of the assembly segment. He has not committed any violation of the provisions of the Act or any offence under Indian Penal Code. The respondent would further submit that the statement which appeared in newspaper in "Dinamalar" dated 18.10.1999 clearly sets out the circumstances in which the respondent was allowed to vote in booth No.4 2 as admitted by the petitioner himself. The permission granted to the respondent by the Presiding Officer in the polling booth does not amount to an admission of guilt under Section 136 of the Act and also under Sections 171 (C) and (D) of Indian Penal Code.

18. The respondent further contends that the petitioner has not alleged as to how such a casting of his vote had materially affected the result of his election.

19. It is further contended that an election petition must be signed and verified by the petitioner in the manner indicated in C.P.C for verification of the pleadings. The election petition has not been verified properly by the election petitioner. Therefore the election petition was liable to be rejected. The verification does not specify as to how some of the paragraphs are verified either as true to his knowledge or how the facts stated in other paragraphs were found to be true to the best of his information. The affidavit accompanying the election petition is also not been verified as required by law. The petitioner has not disclosed any personal knowledge of the allegations in paras-1, 2, 3, 4, 6, 12 and 16. Therefore, the election petition was liable to be dismissed for want of proper verification. The respondent further submits that personation is not a corrupt practice. Votes cast by personation are void votes. The election could be avoided only if the reception of votes cast by impersonation has materially affected the result. The mere misdescription in the electoral roll does not constitute impersonation. A person is said to vote by personation when he casts the vote in the name of another or in a fictitious name. Therefore the allegation that the respondent had committed an electoral offence and also a corrupt practice was nothing but a misconception of the relevant provisions of the Representation of People Act.

20. After the filing the written statement, the following issues were framed for trial on 7.3.2002:-

(1) Whether the election of the second respondent to the 13th Lok Sabha from No.12, Chidambaram (SC) Parliamentary Constituency is to be declared as null and void?
(2) Whether the conduct of the second respondent in having voted in Vridachalam Assembly Constituency, would render his election null and void?
(3) Whether the second respondent is guilty of corrupt practice as contemplated under Section 123(7) of the Representation of the People Act?
(4) Whether the election of the second respondent is liable to be declared void for non-compliance of the provisions of the Representation of People Act, 1951 and of the Constitution of India?

(5) Whether the election petitioner is entitled to be declared as elected from Chidambaram (S.C.) Parliamentary Constituency?
(6) To what other reliefs the petitioner is entitled to?

21. Thereafter, the trial was taken up and the examination of witnesses by both sides as well as that of Court witness No.1 were over on 23.9.2002. On 11.10.2002, when the election petition was posted for arguments, after the argument of the learned Senior counsel for the petitioner had been completed, the learned Senior counsel for the second respondent commenced his arguments. In the course of his arguments, learned Senior counsel contended that the Presiding Officer of booth No.42 who was alleged to have rendered assistance to the second respondent and thus amounting to a corrupt practice under Section 123 (7) of the Act, was not a person in the service of the Government and also did not belong to any of the categories mentioned under Section 1 23 (7) (a) to (g). According to the learned Senior counsel, the Presiding Officer was only a School B.T. Assistant and as such he did not fall under any of the categories mentioned under Section 123 (7) and he was not a Gazetted Officer. Though the point was raised for the first time and no issue had been raised, considering that the issue goes to the root and the very basis of the allegation of corrupt practice and not entertaining the said objection would result in failing to take note of a very fundamental issue, I had permitted the learned Senior Counsel to make his submission on the said issue. As could be expected, this was objected to by the learned Senior counsel for the petitioner and I pointed out to him that the issue raised by the respondent was a very fundamental one relating to the very applicability of Section 123 (7) and if the objection is found to be correct, any judgment in favour of the petitioner assuming that he succeeds, would be rendered a void one. Thereupon, the learned Senior counsel contended that in the event of entertaining the said objection at the belated stage, the petitioner may be permitted to adduce fresh evidence and materials in order to substantiate his contention that the Presiding Officer would satisfy the requirements under Section 123 (7) of the Act and also to rebut the contention raised by the respondent. Learned counsel requested for an adjournment for producing additional evidence and on the next hearing, filed O.P.Nos.740 and 741 of 2002 praying for re-opening of the election petition for the purpose of examining Mr.Ramalingam, Presiding Officer of the booth No.42 in the election held on 5.9.1999 as Court witness and for permission to summon and to examine him with his Service Register and other relevant materials. He was working as B.T. Assistant in the Government Girls High School, Periyakuppam, Panrutti Taluk, Cuddalore District. This petition was, however, objected to by the respondent who f iled his counter affidavit. In the counter affidavit, the respondent contended that the petitioner did not focus the essential ingredients of Section 123 (7) (a) to (g) and he was not aware of the essential ingredients. The petitioner having closed his evidence, cannot now insist on the evidence of Ramalingam. The respondent further contended that he had categorically alleged that the petitioner has not fully and correctly set out any details which would constitute a corrupt practice under Section 123 (7) and therefore the petitioner had enough opportunity to furnish all the material facts and particulars relating to the ingredients of Section 123 (7) and therefore he cannot be permitted to raise any plea after the period of limitation or be permitted to examine any one as a Court witness.

22. A reply affidavit was filed by the election petitioner contending that the said Ramalingam was a Government servant and fell within the category of Officers under Section 123 (7). In the written statement, the said issue was not raised by the respondent and the point was raised only at the stage of argument and therefore the petitioner has to be given an opportunity to examine the Presiding Officer to let in evidence as to whether he belongs to any one of the categories of Government servants mentioned under Section 123 (7). Order 20 Rule 1 7 (A) permits the parties to let in evidence at a later stage also.

23. On consideration of the said contentions and after hearing both parties, I had ordered the petition for reopening and also to examine the said Ramalingam as a Court witness by order dated 11.11.2002. I had held in the said order that the point raised on behalf of the respondent was not raised at any time earlier either in the counter statement of the second respondent nor has any issue been framed for trial. The claim of the petitioner of the P.O being a Government servant under Section 123 (7) was never disputed or denied by the respondent. In fact, no suggestion was also made to the witnesses examined by the petitioner nor even by the respondent himself who was examined as RW.1. The issue was raised by the learned Senior counsel for the second respondent for the first time only in the course of his arguments and that the Court had permitted the counsel to advance arguments only for the reason that the issue goes to the root of the matter and affects the very basis of the election petition. It is only in those circumstances, the election petitioner had come forward with the petition to examine the said Ramalingam. Therefore I held that the objection by the second respondent cannot be entertained. Dealing with the contention of the learned counsel for the second respondent that in the event of the applications being allowed then the scope of the evidence of the proposed witness has to be restricted only for the purpose of finding out whether he is an Officer under any one of the categories of Officers under Section 123 (7) and that the witness may not be examined for any other purpose, I had agreed with the said objection. While allowing the applications it was made clear that the examination of the said Ramalingam as a witness will be restricted only to the issue as regards whether he is a person in the service of the Government, and whether he would fall within any of the categories of Officers mentioned under Section 123 (7) and that the witness was not to be examined for any other purpose.

24. In view of the entertaining of the objections by the second respondent as aforesaid, the following additional issue was framed and summons were also issued to the said Ramalingam to be examined as Court witness No.2

Additional Issue No.1

Whether the Presiding Officer of Booth No.42 was a person in the service of the Government in terms of the provisions of Section 123 (7) Representation of the People Act, 1951, as on the date of the Poll?

25. In his evidence as PW.1, the election petitioner has stated that he belongs to Dalit Panthers Party. He has prayed for setting aside the election as the second respondent had resorted to corrupt practice with the connivance of the Presiding Officer to cast his vote in booth No.42.

The Officers in the booth objected to it because his name was not found in the voters list but the second respondent and the people who accompanied him had threatened the Presiding Officer. The second respondent and his companion took the Presiding Officer aside and had discussion with him. Thereafter the second respondent was allowed to cast his vote with the assistance of the Presiding Officer, knowing fully well that he cannot cast his vote without the assistance of the Presiding Officer. The Presiding Officer was at that time working as B.T. Assistant in Panrutti Taluk. Disciplinary action was in fact taken against the said Presiding Officer. After the second respondent had cast his vote, some of the persons who accompanied him also cast their votes even though their names were not in the voters list and bogus voting took place in the same manner in all the booths through out the Constituency. The election Officers did not prevent the casting of such bogus votes in spite of objections. His Chief Election Agent Vinayagamoorthy lodged a complaint on 13.9.1999 before the Inspector, Virudhachalam and also the District Secretary of the CPI (North) also lodged a complaint regarding the incident. It is true that the complaint by Vinayagamoorthy was belated because he was imprisoned on the day of election after he had cast his vote. He lodged the complaint after he was released. Ex.P.3 is the copy of the complaint lodged by Vinayagamoorthy. The petitioner also gave a complaint to the Chief Electoral Officer and sent the copy of the same to the President of India and the National Election Commission-Ex.P.4. All the newspapers had published the news relating to the casting of vote by the second respondent and himself having admitted the said fact-Ex.P.5 series are the various news items published in the newspapers. P.W.1 would further state that the second respondent came to the polling booth and wanted to cast his vote. The Polling Officer objected to the same and thereafter the second respondent and his supporters threatened the Polling Officer and took him aside as a result of which the Polling Officer allowed the second respondent to cast his vote. He cannot state the exact number of the people who came along with the respondent. They would be approximately 10 to 15 of them. As a result of the said event, in other polling booths also, many persons who did not have their names in the voters list were also allowed to vote by the Polling Officers and as a result, the trend of the election which was favourable to him was effected.

26. In the cross examination, the petitioner has stated that he cast his vote on 5.5.2001 in his village at Andimadam between 11.00 and 11.30 a.m., and only after casting his vote he came to his Constituency and to the polling booth in question. In the cross-examination, he has also given the details relating to the location and the details relating to the situation of the polling booth. He denied the suggestion that his description of the location of booth No.42 was not correct. He did not ascertain from his Chief Election Agent as to who was his polling agent in booth No.42. Apart from the Presiding Officer, there were some other polling Officers totalling about four of them inside the booth on that day. He was not present when the second respondent cast his vote in the booth. The facts stated in the complaint dated 30.10.1999 and in the petition were based on the information given to him by the election agent. Instructions for preparing the election petition were also given by himself and his Chief Election Agent. The facts stated in paragraphs 1 to 4, 6, 12 and 16 were true to his knowledge

and paragraphs 10, 12, 17 to 21 were true to the best of his information. The verification Clause was correct. To a specific question as to whether he has referred to the alleged threat held out to the Presiding Officer in Ex.P.4 the complaint, the witness answered that in the last paragraph he had stated that the respondent had fraudulently obtained the ballot paper without due authority and had kept it in his possession and that the same would mean that the second respondent had received the co-operation of the Presiding Officer under coercion. As regards the disciplinary proceedings against the Presiding Officer, he did not know what was the specific charge framed against the Presiding Officer but he knows that the charge related to the co-operation given by him to the second respondent in casting his vote. He had come to Virudhachalam at one'o clock. He also visited other places like Neiveli, Vadalur, Chidambaram, Sethiyathoppu etc. Though there were many other complaints in other booths he has not given any complaint. His election agent and other polling agents have lodged complaints in the respective police stations. As regards the fact of the second respondent having been allowed to cast his vote, he had mentioned about the gist of the same in paragraph-8 of this election petition. It is true that there is no mention of any threat by the respondent against the Presiding Officer in his complaint, Ex.P.4. It is also true that in Ex.P.3 complaint given by the Chief Election Agent, there was no mention of the respondent taking away the Presiding Officer and threatening him. These facts, he came to know only on enquiry with his Chief Election Agent as to what happened in booth No.42. He did not inform any of the Election Officers like the Returning Officers or observers as regards what happened in booth No.42. He was also not aware of any enquiry by the Revenue Divisional Officer at booth No.42. He denied the suggestion that he did not know about the voting by the second respondent on that day itself and when he came to know only subsequently on reading the newspapers. He cannot say as to which part of the room the second respondent took the Presiding Officer aside. He had told his counsel about the said fact when the petition was drafted. He does not know anything personally about what happened in booth No.42 on 5.9.1999. He has not given any figures relating to the similar votings having taken place in other booths and he is not aware of the total number of such voting. He also denied the suggestion that till the results were announced on 6.10.1999, he did not know anything about the allegations made in the election petition and that it was only because of the defeat suffered by him, he has come forward with the allegations. He has also denied the suggestion that he has made the allegations against the Presiding Officer only for the purpose of the case.

27. In the re-examination, PW.1 has stated that he could not give the complaint immediately because his Chief Election Agent was arrested in the early hours on the following day and there was also violence in the Constituency on the following days.

28. One Vinayagamoorthy has been examined as PW.2, who is the Zonal Secretary of the Dalit Panthers Party and he was the Chief Election Agent of the petitioner. He had appointed the polling agents and one Selvam of Tamil Manila Congress was appointed as polling agent in respect of booth No.42. He went to the polling booth at about 11.00 a. m. And one of the candidates, viz., the second respondent accompanied by 25 others came to

the polling booth. The second respondent approached the Presiding Officer and wanted him to permit him to cast his vote. The Presiding Officer refused the request. There were also shoutings and exchange of words between the Presiding Officer and the second respondent. Thereafter, he had cast his vote in spite of his objections. Other agents are also objected. He could inform the election petitioner only in the afternoon. From Virudhachalam, he went to Kolichanur Government Girls Arts College which was also another polling booth. He had given a complaint that the second respondent had cast a bogus vote. He gave a complaint to the police on 30.10.1999. He was arrested in the early hours of the following day and remanded to custody and he was subsequently released only after 35 days and that is why he could not give the complaint immediately. One Ramakrishnan who was the agent for the 'Congress Party' was also present when the second respondent had cast his vote.

29. In the cross-examination he would state that he belongs to Eraiyur Village which was about 20 kms from Neiveli and Virudhachalam was about 22 kms from Neiveli. He had cast his vote in Eraiyur Village at about 4.00 p.m. to 4.15 p.m. He was going to various booths including polling booths in Neiveli. He went to Neiveli before 10.15 a.m. And after completing his rounds at Neiveli, he went to the polling booth at Arts College, Virudhachalam. From Neiveli, he went directly to the polling booth in the Arts College and he did not visit the other polling booths. He reached booth No.42 between 10.55 a.m., and he was there for about half an hour. He cannot say how many police officers were posted in the said booth. There was one Presiding Officer in the booth. There were six polling agents inside the room where the polling was taking place. He has appointed one Selvam as polling agent. When he entered the polling room, he saw the polling agents and election Officers inside the room. On seeing him, Selvam approached him and told that Ponnusamy (second respondent) along with his supporters were attempting to cast their votes and he also informed him that he wanted to go out of the room because he was afraid that he would be assaulted by the said people. The witness saw the second respondent, Govindasamy and 15 others wearing pink apparels were standing inside the room. Ponnusamy, being a candidate was entitled to go inside the booth. He did not know whether Govindasamy was a voter in the said booth. He had given a complaint on 30.10.1999 but till date he had not verified as to whether Govindasamy was a voter in that booth. Govindasamy also cast his vote along with Ponnusamy at about 11.00 a.m. Though he did not give any written complaint to the Presiding Officer, he complained to him and asked him as to how he allowed the second respondent to cast his vote and the Presiding Officer told him that he had no other alternative because he was frightened and he was taken aside and pressurised to allow the second respondent and his supporters to caste their votes. The witness was present when Ponnusamy cast his vote. He did not ask Selvam as to whether the Presiding Officer had made any entry in the voters list and then allowed Ponnusamy to cast his vote. Though there was a police station nearby, he did not give any complaint. He wanted to give the complaint only after consulting the candidate/the election petitioner. He came out of the College at 12 .30 p.m. and he saw the petitioner at about 1.15 to 1.30 p.m. He had talked to him only for about two minutes and informed him about the second respondent having cast his vote along with his supporters. The witness would further state that there was

conversation between the Presiding Officer and Ponnusamy and Ponnusamy had demanded that he should be allowed to vote but the Presiding Officer refused. Thereafter the second respondent and the Presiding Officer went aside about four steps away from the place where the Presiding Officer was sitting and both of them talked to each other. He cannot say what they had actually talked. He could not give any complaint immediately thereafter because they were receiving continuous reports of disturbances from various parts of the Constituency. He went to sleep only at 3.00 a.m. On 6.9.1999 and he was woken up by the police, who had arrested him. He was under custody for about 38 or 39 days and he was released only on 13th or 14th of October 1999. He gave the complaint after 15 days and the complaint was written by his advocate on his instructions. He was informed that the petitioner had given a complaint. He did not know about the details. It is true, though he has not mentioned in Ex.P.3 that the second respondent took aside the Presiding Officer and talked to him. Ex.P.3 was addressed to the Chief Election Officer and to the State Election Commissioner. He also read in the newspaper that the Chief Electoral Officer had announced that action would be taken against the Presiding Officer. Election Commission had announced that all persons who had made complaints were at liberty to approach the Courts. It was not correct to state that he had given the complaint on 30.10.1999 only because the Election Commission had made the announcement on 29.10.1999. Though he knows that proceedings were taken against the Presiding Officer, he does not know what were the charges framed against him. He was suspended from service. The witness denied the suggestion that the second respondent had cast his vote at 8.00 a.m., in the morning. The witness also filed Ex.P.8, the identity slip issued in favour of K.M.Selvam.

30. One G.Ramakrishan, who was the Election Agent for the ' Congress Party' has been examined as PW.3. Ex.P.9 is the identity slip. He would state that the second respondent came to the booth at 11.00 a.m., along with his supporters. He had cast his vote though he was not a voter in the said booth. The second respondent's name does not find a place in the list of the voters in that booth. He objected to the attempt on the part of the second respondent to cast his vote. But the supporters of the second respondent shouted him down. The second respondent along with his supporters went to the Presiding Officer and told him that he wanted to cast his vote. The Presiding Officer refused to allow him on the ground that he was not a voter. The second respondent took the Presiding Officer aside and talked to him. Thereafter the Presiding Officer allowed the second respondent to vote stating that he would see that the second respondent wins the election. He told about the incident to the candidate Dr.Sumathy Udhayakumar and she gave a complaint to the election authorities.

31. In the cross-examination, PW.3 would state that his native place was Virudhachalam. It was not correct to state that the total number of votes polled on that day in booth No.42 was 265. The total number of votes in the said booth was 185. He does not have a separate note regarding the list of persons who had cast their votes. In the list of voters he had ticked the names of persons who had voted. He knows Govindasamy who was the sitting MLA of Virudhachalam. He came along with the Ponnusamy at 11.00 a.m. Govindasamy did not have vote in booth No.42. The witness did not

give any written objection against the voting by the second respondent, as it was not the procedure to accept any written objection in the polling booth. His candidate Dr. Sumathy Udhayakumar gave a written complaint subsequently and similarly ' Communist Party of India" also gave a written complaint. Subsequently, he came to understand that action has been initiated against the Presiding Officer. But he does not know about the details of the disciplinary action. The witness also denied the suggestion that the second respondent cast his vote at 8.00 a.m., on the said day.

32. The second respondent has examined himself as RW.1. He had contested the Parliamentary elections from Chidambaram Parliamentary Constituency which was held in 1999 as a candidate belonging to PMK. On the polling date, he went to booth No.42. There were six polling booths inside the college campus and he went around 8.00 a.m. He went to the booth alone and went inside the booth because he wanted to know whether he can cast his vote though he was aware that he did not have his name in the booth. He did not meet anyone in the polling booth. He just wanted to know who was the Presiding Officer and one particular person identified himself as the Presiding Officer. He showed him the Certificate issued by the Revenue Divisional Officer, Ponneri and wanted to know whether he could cast his vote in the booth on the basis of the said Certificate. As he was not aware of the Electoral Law, he wanted to know whether he could cast his vote in the said booth, even though his name does not figure in the voters list. The Presiding Officer then consulted his polling officers for a minute and directed them to give the last sheet of the ballot paper. Since a candidate could contest anywhere in India, he wanted to know whether he could cast his vote in the booth based on the Certificate issued by the R.D.O. After consultation among themselves, the Polling Officer took his signature on the counterfoil of the ballot paper and the witness cast his vote. He was inside the booth for hardly about 2 or 3 minutes. Thereafter he went all around the Constituency to know about the trend of polling. Around 11'o clock, he was in Mangalore Constituency. When he had asked the Polling Officer his permission to vote, there was no objection from anyone.

33. On the date of polling, he was residing in a rented house in Virudhachalam. Dr.Govindasamy also came along with him and with his wife. He went to one of the six polling booths. He left his house on that day at about 7.45 a.m. To 8.00 a.m., and he first visited booth No.42, who was accompanied by two or three of his party people. He did not go into the booth followed by a motor-cade of several cars. The witness would further state that he came to politics at the end of 199 0 and prior to the same, he was a writer, publisher and social worker. He was a friend of Mr.Mani Sankara Iyer, who was a Congress M.P. He has not written many books on politics. He has translated books on fiction and non-fiction. Even when he filed his nomination papers, he was aware that he could not cast his vote in Chidambaram Parliamentary Constituency. He does not know as to whether a mock poll was held in a number of polling booths including booth No.42 prior to the announcement of the polling. He did not attend any meeting convened by the Returning Officer. It is true that he has not stated in the counter statement that he wanted to know from the Presiding Officer whether he could cast his vote in booth No.42 but the substance of the same has been stated in

paragraph-8 of the counter statement. The verification clause in the written statement was also true which includes paragraph-8 also. Subsequently, he came to know that the Presiding Officer was Ramalingam and he was fully aware that the name of the witness did not figure in the electoral list of booth No.42. The Presiding Officer did not raise any objection for giving the ballot paper to him. He had contested the election for the first time. He does not know who was the polling agent in booth No.42 representing his party. He chose booth No.42 because it was the first room which he had entered after he went into the college campus. It was not correct to state he chose booth No.42 because the Presiding Officer could be prevailed upon to permit him to vote. But now knows that casting of votes in the booth where the individuals name was not found in the electoral roll was an electoral offence. He has not taken any steps to summon the affidavit of the Presiding Officer. After the election, he was appointed as the Minister which post he held for 16 months. The fact of his voting was the subject matter of wide publicity, debate and discussion on that time. He cannot say as to whether Mr.Naresh Gupta, the Chief Electoral Officer had recommended any action on the complaint against him. The witness had given an interview that he had not committed any mistake intentionally and now he knows that it was a mistake. At that time he did not know the exact provision of law. He has not given any statement before the Returning Officer or the RDO, stating that RDO Ponneri had given him a Certificate and informed him that he could vote anywhere with the said Certificate. It was not correct to state that he forcibly entered booth No.42. When he asked Presiding Officer whether he could vote in the booth based on the Certificate, the Presiding Officer consulted with the Polling Officers and permitted him to vote. If the Presiding Officer had not permitted him to vote he would not have cast his vote. He would further admit that what he did at that time was legally wrong. He also denied the suggestion that because of his persuasion, the Presiding Officer consented to the same and gave him the ballot paper. It was not correct to state that the casting of his vote had changed the entire trend in the Constituency. He has now understood that the Presiding Officer had violated the law by permitting him to cast the vote. He did not coerce and enlist the support of the Presiding Officer.

34. Mr.Naresh Gupta, who was the then Chief Electoral Officer during the elections in May 1999 has deposed as Court witness No.1. In his evidence, he has stated that he submitted four reports to the Election Commissioner in respect of the election held to Chidambaram Reserved Constituency on 15.10.1999, 18.10.1999, 20.10.1999 and 21.10.1999 . He also enclosed a copy of the press release made by them along with his report dated 20.10.1999. The said reports were with reference to the electoral offence committed by the second respondent on a representation given by Dr.Sumathy Udhaya Kumar and Mr.Dhanasekaran, District Secretary of the CPIM. Ex.C.1 series are the four reports given by the witness. For the question as to whether the reports contain statement of facts as well as the opinion of the witness, the witness replied that the report was based on the report of the Returning Officer of the Chidambaram Parliamentary Constituency together with the legal provisions under the Representation of People Act. Replying to the question by counsel for the second respondent, the witness would state that the report was not result of the enquiry held by him and he did not verify as

the correctness of the report given by the Returning Officer.

35. As stated earlier, after the arguments had commenced due to the circumstances already mentioned above, the Presiding Officer was summoned as a Court witness. He was examined as Court witness No.2, only for the purpose of ascertaining as to whether he belonged to any of the categories of the Officers mentioned under Section 123(7) of the Act. He would state that he was the Presiding Officer in booth No.42 . He was given an order of appointment as Presiding Officer and Ex.C.2 is the order of appointment issued by the District Election Officer. At that time, he was working as B.T. Assistant at Government Girls High School. He was in Government Service and his basic pay at that time was Rs.8,000/-. To a specific question as to whether he was a gazetted Officer during the said period, the witness would deny the same. The witness had brought the Service Register, which is marked as Ex.C.3. By referring to Page No.10 of Ex.C.3, he would agree that his designation has been shown as Special Grade School Assistant. His pay as on 1.7.1998 was Rs.9,650/-. He would admit that there was a rule that any employee drawing a pay above Rs.5,000/- was eligible to attest the documents. The said rule was however introduced only after the elections. No panel was prepared by the Government of the eligible persons to be given Selection Grade or Special Grade. The Joint Director of Education confers Selection Grade, on employees who complete 10 years of his service. He would admit that Special Grade was superior to Selection Grade. While being cross examined by the counsel for the second respondent, he would state that on the day when the polling took place on 5.9.1999, he was a Special Grade School Assistant. He has not been classified by the Department as a Gazetted Officer. He does not know as to whether only Headmasters of Government High Schools have been notified as Gazetted Officers. He would further agree and state that because he was given Selection Grade and the Special Grade, he was not notified as a Gazetted Officer.

36. Mr.G.Subramaniam, learned Senior Counsel for the petitioner took me through the oral and documentary evidence and contends that the fact that the second respondent had voted in booth No.42 where he is not a voter, is an admitted fact and not disputed. The fact that he had prevailed upon the Presiding Officer to allow him to vote is also an admitted fact except for the attempt on the part of the second respondent to make it appear as though the second respondent did not put any pressure or any coercion or undue influence on the Presiding Officer. Though there may be some discrepancy regarding the actual time when the second respondent had cast his vote as between the evidence on the side of the petitioner and on the side of the second respondent, the necessary basic facts are admitted by the second respondent himself and hence the contradictions, if any, are immaterial. The fact that the second respondent had secured also the assistance of the Revenue Divisional Officer, Ponneri by giving a Certificate to him, certifying that he is eligible to vote at Chidambaram Constituency, is again an admitted fact.

37. Learned counsel would further submit that the ingredients of Section 123 (7) are more than adequately satisfied and that the intention of the Parliament behind enacting Section 123 (7) was clear, viz., to maintain purity of elections and that the election process should be fair

and impartial. The single vote cast by the second respondent or a handful of similar votes polled by few other individuals may not have affected the result of the election. But the gravity of the misconduct cannot be judged only from the point of view of difference of votes and whether the misconduct would have made any difference to the result of the election. Utilising the service of the Presiding Officer, will be the most significant instance of the corrupt practice as enumerated under Section 123 (7), which has been committed in the present case with impunity. Learned Senior Counsel referred to the distinguishing features between the relief to be granted in election petition under Section 100 (1) (b) and Section 100 (1) (d) (iv) of the Act. While the former would result in setting aside the election on proof of the alleged corrupt practice, under the second provision apart from proof of the corrupt practice, the petitioner should also establish that the result of the election had been materially effected. Therefore, if once the allegation of corrupt practice under Section 123 (7) was established, this Court would be inclined to set aside the election. Apart from Section 123 (7), the learned Senior Counsel would also submit that the election was also liable to be set aside under Section 100 (1) (d) (iv) considering that on the face of the conduct of the second respondent, it amounted to non-compliance and violation of the provisions of the Act and the rules made thereunder and the election was liable to be set aside.

38. On the issue of the Presiding Officer, being or not being an Officer under any of the categories mentioned under Section 123 (7), reference is made to Section 129 which also restrains the polling Officials from doing any act for the furtherance of the prospects of the election of a candidate. According to the counsel, Section 129 should be read with Section 123 (7) which would make it clear that the election staff of various categories as mentioned thereunder would fall under the category of Officers mentioned under Section 123 (7). Admittedly, the Presiding Officer (P.O.) was a Government servant. He was drawing a salary of nearly Rs.10,000/-. He was appointed as the Presiding Officer by the Collector as an Official acting under the provisions of the Act and in fact, after the incident, disciplinary proceedings were also initiated against the Presiding Officer. In furtherance of the submission that the Presiding Officer in this case is a Gazetted Officer, learned counsel referred to G.O.Ms.No.427 (Finance Department) dated 28.8.1998. In that Government Order, revision of scales of pay to various categories in the School Education Department is enumerated and on his interpretation, would contend that the Government Order applies to all categories of teachers excepting teachers who had become assigned with the Selection Grade and Special Grade. This would mean that Selection Grade and Special Grade B.T. teachers are kept as a separate category. This was due to the reason that they are Gazetted Officers. Reference is also made to G.O.Ms.No.148, School Education Department dated 17.9.2001, granting powers to the B.T. Assistants to attest certificates, photographs and that such powers are granted only to Gazetted Officers. It is further stated that earlier there was a separate category of Gazetted Officers. But subsequently, an amendment was introduced to Rule-2-A of the Tamil Nadu State and Subordinate Service Rules and instead of being designated as a Gazetted Officer or Non-Gazetted Officer, they are grouped into four different categories viz., Group A,B,C and D, on the basis of salary. For a B.T. Assistant, the pay

scale was more than Rs.5,000/- and for Selection Grade Rs.6,500/- and for Special Grade Rs.8,500/-. Admittedly, the Presiding Officer was a Special Grade teacher and his salary at the time when he was functioning as Presiding Officer, was Rs.9,650/-. Therefore, he was definitely a Gazetted Officer, even though he was pleading ignorance about his status as a Gazetted Officer.

39. Learned Senior Counsel further submits that the provisions of the Act, especially Part-VII dealing with corrupt practices, requires to be interpreted in a manner to uphold the purity in elections and not in a manner which would render the provisions ineffective and meaningless. Reference was also made to the rulings of this Court and the Supreme Court in support of his various contentions, which will be dealt with later at the appropriate stage in order to avoid repetition.

40. Mr.R.Thiyagarajan, learned Senior Counsel for the second respondent had raised the following contentions.

41. He would contend that the polling figures will show that the second respondent had won the election with a huge margin of 1,19,563 votes and therefore, while any issue is to be taken up for consideration for setting aside the election, the Court has to bear in mind as to whether the allegations made against the elected candidate would warrant interference and whether the act complained against the declared candidate would have really contributed to the success of the declared candidate. The difference in the votes was so vast that the allegation of a single person having cast his vote wrongly, has to be ignored at the threshold itself. He would further submit that none of the allegations in the election petition regarding the circumstances under which the second respondent had cast his vote, had been substantiated. In para-8 of the election petition, it is alleged that the second respondent had entered the booth forcibly accompanied by his partymen and the Presiding Officer succumbed to the force and had allowed the second respondent to vote. Neither the election petition contains any details, much less any evidence had been adduced in the trial in the said context. There was also no allegation of the Presiding Officer having done anything intentionally to further the prospects of the second respondent. In para-9, an allegation has been made to the effect that the conduct of the second respondent resulted in several other supporters and the party members belonging to P.M.K., having indiscriminately entered the polling booths and had cast their votes and they had done so with the active assistance of the Presiding Officer and that the actual number of such voters will be furnished at the time of trial.

42. According to the learned Senior Counsel, no such evidence had been let in by the petitioner. There are no proper details in the election petition regarding the time when actually the second respondent had cast his vote. In the evidence, there were contradictions regarding the actual time. As per the evidence of the second respondent, he had voted in the early morning at about 8.00 a.m., which was consistent with the official evidence of the Chief Electoral Officer, who had been examined as C.W.1. Ex.C.1 series disclose that the voting by the second respondent took place at about 7.15 a.m. Therefore, the claim of the witnesses for the petitioner as

though they had witnessed the scene at 11.00 a.m., is totally false and their evidence has to be ignored. None of the witnesses for the petitioner were speaking the truth.

43. While dealing with the ingredients of Section 123 (7), learned counsel contends that to make out a misconduct of corrupt practice under the said provision, it was not sufficient to merely establish that the respondent had obtained the assistance of any of the Officers mentioned thereunder. It was also necessary to establish that the assistance was aimed at furthering the prospects of the election of the respondent. The prospects of election of the respondent was not going to be increased or enhanced by the polling of a single vote by the second respondent. It is not as though the Presiding Officer had done anything more than permitting the second respondent to vote at the booth which resulted in casting not more than a single vote. Such an action cannot be said to be in furtherance of the chances of the second respondent to win the election.

44. On the issue as to whether the Presiding Officer falls under any one of the categories mentioned under Section 123 (7), learned Senior Counsel contends that it is admitted by the petitioner himself, that the Presiding Officer was working only as a B.T. Assistant at the relevant point of time. In the cross-examination also he has admitted that the Presiding Officer was a teacher. A B.T. Assistant is not a Government Servant much less a Gazetted Officer. The ingredients of Section 123 (7) has to be strictly made out and the person whose services or assistance had been alleged to have been obtained by the successful candidate should fall strictly under any one of the categories mentioned thereunder. If not, the election petition has to be thrown out. There can be no inference, presumption or conclusion of the nature of the post or category only on the basis of pay scale so as to treat an individual as a Gazetted Officer. The term Gazetted Officer has a definite meaning and can refer only to individuals holding a post specifically notified as a Gazetted post. The post of B.T. Assistant was not a Gazetted post. The power of signing or attesting documents could be given to any one and he need not be even a Government servant. There is absolutely, no evidence on the side of the petitioner to show that the Presiding Officer was a Gazetted Officer. He does not fall under any of the categories specifically mentioned under Section 123 (7). No rules have also been framed under Section 123 (7) (g) which visualises any other class of persons in the service of the Government being prescribed and notified for the purposes of that Section.

45. In support of his submission that the reliefs contemplated in an election petition, arise only out of a statutory right and is not a fundamental or common law right and can be granted only strictly within the four corners of the statute, counsel relies on the following judgments:-

1. N.P.Ponnusami vs. Returning Officer, Namakkal (AIR 1952 SC 64)
2. Jyoti Basu vs. Debi Ghosal (AIR 1982 SC 983)
3. Mohinder Singh vs. Chief Election Commissioner (AIR 1978 SC 851)

46. The provisions under the Act are mandatory and have to be strictly complied with, vide the following judgments:-

1. C.H.Subba Rao vs. Member Election Tribunal (AIR 1964 SC 1027)
2. Manubhai vs. Popatlal (AIR 1969 SC 734)
3. S.N.Balakrishna vs. Fernandez (AIR 1969 SC 1201)

47. Learned Senior Counsel also referred to few other judgments and rulings in the context of the various issues arising for consideration, general and specific, dealing with appreciation of evidence in election petitions vis-a-vis the pleadings, what type of conduct of a Government servant could be described as "assistance" under Section 1 23 (7) and those rulings will be discussed at the appropriate stage.

48. Issue No.2: As regards issue No.2, this Court is required to find whether the conduct of the second respondent having voted in Virudhachalam Constituency would by itself render this election void only on the ground of such voting. The fact of the second respondent having cast his vote at booth No.42, Virudhachalam Constituency of Chidambaram Parliamentary Constituency is not in dispute. It is also not in dispute that the second respondent is not a voter in the said booth, much less in the Chidambaram Constituency and that he is only a voter in Villivakkam segment (State Assembly) of Madras North Parliament Constituency. This conduct of voting is certainly an electoral offence and in violation of specific provisions in the Act under Rules. Chapter-VII of the Act deals with electoral offences and under Section 136 (d), a person shall be guilty of electoral offence if he without due authority supplies to any person or receives any ballot paper. Under Section 62, no person who is not entered in the electoral roll of a Constituency shall be entitled to vote in that Constituency. An elector is defined under Section 2 (e) of the Act, in relation to a Constituency, as a person whose name is entered in the electoral roll of that Constituency for the time being in force. In the background of the aforesaid provisions, it is clear that a voter who is enrolled in one Constituency can vote only in that Constituency and he cannot vote in any other Constituency. It is true that the right to contest the election is given to the citizen to contest from any Constituency. The only requirement is as provided under Section 33 (5) which requires that where the candidate is an elector from a different Constituency, he has to furnish a certified copy of the electoral roll of that Constituency where his name is registered, along with his nomination paper. Therefore, the right to vote is restricted only to the Constituency where his name stands registered as a voter. He cannot vote in any other place.

49. To what extent the said conduct can affect the election is made clear on an analysis of Part-VI of the Act, dealing with disputes regarding elections and Section 100 which enumerates the grounds for setting aside the election. None of the grounds relate to any act of the declared candidate which may amount to an electoral offence but not specifically detailed as a corrupt practice under Chapter-I of Part-VII. All the electoral offences detailed under Chapter-III of Part-VII do not fall under Section 100. The question is whether the conduct would amount to a

corrupt practice as enlisted under Section 123 read with Section 100 to set aside the election is to be considered under Issue No.3. The question whether there is any violation by noncompliance of the provisions of the Constitution or this Act or any of the Rules made thereunder is to be considered under Issue No.4.

50. For the purpose of this issue, it is sufficient to point out that voting in a Constituency or a booth when a person has no vote, is only an electoral offence and not one of the enumerated corrupt practices, which alone would constitute as grounds to set aside the election under Section 100. Declaring an election as void has to be restricted to the grounds mentioned under Section 100. Electoral offences contemplated under other the provisions of the Act, as long as they are not included as one of the grounds as under Section 100, cannot result in setting aside the election or declaring the election as null and void.

51. Therefore, I am inclined to hold that the mere act of the second respondent voting in booth No.42 of Virudhachalam Constituency, though not a voter of the said Constituency, which is certainly an electoral offence, cannot result in setting aside the election or holding the election as null and void.

52. With the result, I am inclined to answer this issue in favour of the second respondent and against the petitioner.

53. Issue No.4:- This issue is based on the allegations contained in paragraphs 22 and 23 of the election petition, in particular para-23 where under the petitioner had pleaded that the election was liable to be declared as void also for the reason that the declared candidate had committed an electoral offence, by violating the provisions of the Representation of People Act and the Constitution of India and the conduct of the election rules etc., by committing the electoral offence of exercising franchise in a booth where he was not a voter, in violation of the provisions of the Act and the Rules. The said allegation was already one of the issues raised in O.A. No.58 of 2001, filed by the second respondent for striking off the petition on the ground that the petition did not disclose any cause of action. The said application was disposed of by order dated 19.10.2001 in and by which the objection of the second respondent relating to the above issue, was upheld. The objection raised by the second respondent was considered as point No.3 and it was held that the allegations in the election petition did not make out a proper case for declaring the election of the returned candidate as void on the ground of noncompliance of the provisions of the Constitution, the Act and the Rules namely under Section 100 (1) (d) (iv). Consequently, para-23 of the election petition, to the extent of raising the said ground was held as liable to be struck off and thus ordered to be struck off. As no appeal has been filed against the said order, it has become final and hence the above issue will not arise for consideration and is answered against the petitioner.

54. Issue No.3:- As stated earlier, there is no dispute over the basic fact of the second respondent having voted at booth No.42 and in a Constituency/booth where he is not a voter, which is an electoral offence. But in order to make out a case of corrupt practice under Section 123 (7) the essential ingredients have to be established viz., as to whether the second respondent had obtained or procured or attempted to obtain or procure, the assistance and services of a Government servant to further his prospects in the election, in the manner as indicated in Section 123 (7) itself. Mr.Thyagarajan, learned Senior Counsel for the second respondent very strenuously emphasised that the proceedings under the Representation of the People Act, especially allegations corrupt of practice have to be proved as charges in criminal proceedings, beyond reasonable doubt. It is true that the Supreme Court had repeatedly emphasised that a charge of corrupt practice should be adjudicated in an election petition as strictly as in criminal proceedings. At the same time, the Supreme Court had also emphasised that when once the initial burden is discharged, then the burden would shift to the respondent to let in rebuttal evidence. Election law is not excluded from the basic rules of evidence, such as admissions appearing against the party who makes the admissions, obligation to let in rebuttal evidence, to let in evidence on an issue which is specially within the knowledge of a particular party (Section 106 of the Indian Evidence Act) etc. Therefore, the mere emphasis that a charge of corrupt practice should be proved as a criminal charge does not mean that even the admissions made by the respondent should be ignored and the petitioner should prove every fact as in a criminal proceeding, including admitted the facts. This will be an extreme and unacceptable proposition. Even in a criminal proceeding, admissions and confessions are admissible and can be proved against the accused. Admissions and confessions become inadmissible only when it appears to the Court that the same had been obtained by any inducement, threat or promise or when the statement is made to a Police Officer. Extra judicial confession and judicial confession are admissible in evidence. Any admitted fact either in a criminal or civil proceeding furnishes the best evidence unless explained or shown to be wrong.

55. In Gajanan Krishnaji Bapat vs. Dattaji Rashobaji Meghe (AIR 19 95 SC 2284), the Supreme Court held that though in election petitions as regards allegations of corrupt practice, standard of proof is generally speaking that of criminal proceedings, it does not mean or imply that the returned candidate is absolved from his liability to bring forth evidence on record to rebut the case of the petitioner and to prove such facts which are within his knowledge. It was further held that though in a criminal trial, the accused has the liberty to keep silent, in an election petition the returned candidate has to place before the Court materials to show that he had not committed the corrupt practice as alleged and whenever necessary should adduce evidence.

56. In Subhash Desai vs. Sharad J. Rao (AIR 1994 SC 2277), the Supreme Court dealt with an assertion by the election petitioner to the effect that a statement of fact published in a newspaper published by the returned candidate was false. It was held that the election petitioner had discharged his initial onus and then the onus shifted to the other side.

57. While dealing with an objection relating to whether full particulars and material facts have been given in the election petition in terms of Order-6 Rule 16 and Order 7 Rule 11 of C.P.C., the Supreme Court held that if the petition disclosed sufficient cause of action and if the cause of action is unrebutted, it would result in holding the election as void vide the judgment in D.R amachandran vs. R.V. Janakiram and others (AIR 1999 SC 1128). I am referring to this ruling, only to emphasis that in an election petition appreciation of evidence would also depend upon and include the obligation of both sides to adduce proper evidence and the oft repeated expression that the proof of corrupt practice should be in the same manner as in a criminal proceeding, cannot lead to a conclusion that the successful candidate can sit back without giving any evidence even in respect of facts which are specially within his knowledge or that his admissions should be ignored.

58. In the above background of principles relating to the quality of evidence which is required for appreciation of the evidence, the oral and documentary evidence in this case has to be analysed and to be seen whether the ingredients of the corrupt practice as contemplated under Section 123 (7) are satisfied.

59. As regards the circumstances under which the second respondent had approached the P.O and he was permitted to cast his vote, P.W.1 is not an eye witness and admittedly, he was not present at that time and his complaint was based only on information given by his election agent. Therefore, his evidence is only hear say and can be referred to only for corroborative purposes and any other issue arising for consideration.

60. P.W.2 was the Chief Election Agent of the petitioner. According to him at 11.00 a.m., when he went to booth No.42, the second respondent approached the P.O and wanted the P.O to permit him to vote. But the P.O refused. Thereafter there were exchange of words between the P.O and the second respondent. Subsequently, the second respondent was permitted to vote in spite of the objections of the witness and objections of the other agents. In the cross-examination also he has reiterated the same facts. He would further state that the second respondent was accompanied by one Govindasamy and his partymen of about fifteen persons. When he approached the P.O and complained to him, the P.O told him that he had no other alternative, as he was threatened and was taken aside and pressurised to allow the second respondent to vote. He has reiterated stating that there was a talk between the P.O and the second respondent and at first the P.O refused. Thereafter, they went aside about four steps away and talked to each other. The witness cannot say what they were talking to each other. He has also denied the suggestion that the second respondent had voted at 8.00 a.m.

61. P.W.3 was the polling agent of the first respondent. He went to polling booth by 6.30 a.m. The polling commenced at 7.00 a.m. The second respondent came to the booth at 11.00 a.m., along with about twenty of his supporters. He came and cast his vote though he was not a voter in the said booth. The name of the second respondent does not find a place in the list of 845 voters. When he tried to cast his vote, the witness

objected to the same but the supporters who had accompanied the second respondent shouted him down. Then along with his supporters, he went to the P.O and told him that he wanted to cast his vote. The P.O, however, refused to allow him on the ground that he was not a voter in the said booth. Thereafter the second respondent took the P.O aside and talked to him and the P.O allowed the second respondent to vote and the P.O also said that he would assist the second respondent for winning the election and that he was prepared to face any consequences. The witness told about this incident to the first respondent and she gave a complaint to the election authorities. In the cross-examination, he has stated that he was in the polling booth from 7.00 a.m. to 5.00 p.m. throughout the polling time. He has reiterated again that he knew what the P.O and the second respondent had talked to each other. The second respondent wanted to cast his vote and assured the P.O that he will take care of any consequences which may follow and then the P.O agreed to assist the second respondent in casting his vote. He also denied the suggestion that the second respondent had cast his vote at 8.00 a.m.

62. The following documentary evidence are also furnished by the petitioner which are relevant for this issue.

63. Ex.P.3 is the complaint by P.W.2, the Chief Election Agent of the petitioner to the police dated 30.10.1979, alleging that on the polling date, the second respondent accompanied by Dr.Govindaswamy and others came to Booth No.42 and threatened the P.O for the supply of ballot paper and the second respondent had cast his vote even though he was not a voter anywhere in that Constituency. He has also referred to the complaint lodged by others and that no action had been taken thereon and hence requested further action to be taken. Ex.P.7 is the acknowledgement by the police. Ex.P.4 is the complaint by the petitioner to the police dated 25.10.1999 to the Chief Election Commissioner, New Delhi, referring to the conduct of the second respondent having cast his vote at Virudhachalam, requesting disqualification of the second respondent, as according to him he was not entitled to hold the Office of the Member of Parliament. Ex.P.5 series is series of news paper reports, regarding the incident and the photograph of the second respondent casting his vote in the ballot box. Ex.P.6 is the identification card and order of appointment of P.W.2 as the Election Agent of the petitioner, issued under Form-8. Ex.P.9 is the identification card of P.W.3 as the polling agent of Dr.Sumathy Udhayakumar, the first respondent herein.

64. In contrast, on the side of the second respondent, R.W.1 alone has been examined being the second respondent himself. The following are the salient features of the oral evidence given by him which are relevant for this issue. No documents have been marked on his side.

65. He would state that he went to the booth in his capacity as a candidate and he went alone. Inside the booth, he wanted to know whether he could cast his vote though his name was not found in the voters list of the said booth. He wanted to know who the P.O was and one particular gentleman identified himself. The second respondent showed him the Certificate issued by R.D.O., Ponneri and wanted to know whether he could cast

his vote in the booth based on the said Certificate. The P.O then consulted with the Polling Officers for a minute and directed them to give the last sheet of the ballot paper. The second respondent wanted to know whether he could cast his vote in the booth based on the Certificate issued by the R.D.O. After consultation among themselves, Polling Officer took his signature on the counterfoil of the last sheet of ballot paper book of the booth and after getting the ballot paper he cast the vote. There was no objection from any agent while he was talking to the P.O. In the crossexamination, he has stated that he went to premises where booth No.42 was located along with Dr.Govindaswamy and his wife and he went to one of the six polling booths. He left his house on that day at about 7.45 a.m.-8.00 a.m. He was accompanied by two or three party people. He would further state that even when he filed the nomination papers, he was aware that he could not cast his vote in Chidambaram Parliamentary Constituency. He would also state that his statement in the written statement that he never asked the P.O whether he could vote in the booth nor did he seek the assistance in this regard, was correct. The further statement in the counter statement that the P.O had also given an affidavit to the effect that he permitted the second respondent to cast his vote without being asked for, was also correct. He did not personally know about the affidavit given by the P.O. The P.O did not raise any objection for giving the ballot paper to him. He would further state that as on now he knows that casting of votes in a booth where the name of the person was not found in the electoral roll of the said booth was an electoral offence. He has not taken any steps to summon the affidavit of the P.O. The issue of the second respondent having cast his vote at Virudhchalam became a subject of wide publicity and debate and discussion at that time. He has given an interview that he has not committed any mistake intentionally. At that time, he did not know the exact provisions of law and hence he had cast his vote. He has not given any statement before the Returning Officer or the D.R.O., stating that the R.D.O., Ponneri had given him a Certificate and informed him that he could vote anywhere with the said Certificate. He would further state if the P.O had not permitted him, he would not have cast his vote. He would also deny the suggestion that the P.O was made to succumb due to his persuasion to give the ballot paper. He would also deny that he had coerced and enlisted the support of the P.O.

66. The only further evidence relating to the actual occurrence of the second respondent having cast his vote is the evidence of C.W.1, who was the then Chief Electoral Officer of State of Tamil Nadu during May 1999. As already stated, he has marked a series of reports sent by the Office of the Chief Electoral Officer to the Election Commission of India, New Delhi. Exs.C.1 series contain three reports dated 15.10.1999, 16.10.1999 and 21.10.1999 and a covering letter dated 2 0.10.1999, enclosing a copy of a press note. All these reports have been sent by the witness only on the basis of the report of the Returning Officer/Assistant Returning Officer, who was directed to hold a discreet enquiry. The reports which have been marked in evidence are only consequential reports sent by the Chief Electoral Officer, (C. W.1) and in his evidence C.W.1 has clearly stated that he has not personally verified as to the correctness of the report given by the Returning Officer. Neither the Returning Officer nor the Assistant Returning Officer has been examined as witness nor their reports have been filed. With the

result, no reliance can be placed upon nor can any reference be made to the said reports for deciding the issue in question.

67. In the above back ground, this Court has to examine as to whether the petitioner has made out a proper case for finding the second respondent guilty of corrupt practice under Section 123 (7). In order to appreciate the scope and ingredients of the corrupt practice under Section 123 (7), it is necessary to extract the provision and also the judgments referred to by both sides before a detailed analysis of the evidence is undertaken:

"123. Corrupt Practices:-

.. ..

(7) The obtaining or procuring or abetting or attempting to obtain or procure by a candidate or his agent or, by any other person with the consent of a candidate or his election agent, any assistance (other than the giving of vote) for the furtherance of the prospects of that candidate's election, from any person in the service of the Government and belonging to any of the following classes, namely:-
(a) gazetted officers;
(b) stipendiary judges and magistrates;
(c) members of the armed forces of the Union;
(d) members of the police forces;
(e) excise officers;
(f) revenue officers other than village revenue officers known as lambardars, malguzars, patels, deshmukhs or by any other name, whose duty is to collect land revenue and who are remunerated by a share of, or commission on, the amount of land revenue collected by them but who do not discharge any police functions; and
(g) such other class of persons in the service of the Government as may be prescribed:
(Provided that where any person, in the service of the Government and belonging to any of the classes aforesaid, in the discharge or purported discharge of his official duty, makes any arrangements or provides any facilities or does any other act or thing, for, to, or in relation to, any candidate or his agent or any other person acting with the consent of the candidate or his election agent (whether by reason to the office held by the candidate or for any other reason), such arrangements, facilities or act or thing shall not be deemed to be assistance for the furtherance of the prospects of that candidate's election.)

68. In Mohd. Ibrahim vs. Election Tribunal (AIR 1957 Allahabad 292), a Division Bench of the Allahabad High Court held that the policy embodied in Section 123 (8) (old provision corresponding to Section 1 23 (7)), was to keep the Government servants aloof from politics and to prevent the machinery of the Government being used for furtherance of a candidate returned and that it was not every specific act which is done by the Government servants at the instance of a candidate which would come within the said class. The Division Bench cited the example of a candidate utilising the

services of Railway or Postal Department, for travelling or to deliver copies of his election program to his supporters. They are normal activities and cannot be brought under Section 123 (8). The factual allegation which arose for consideration in that case was the assistance rendered by the Personal Assistant to the Minister (the candidate), typing the election pamphlets. The Division Bench made a comparison with a driver who is also the Government employee driving the car of the candidate and the Court held in the negative.

69. Rajkushan vs. Binod (AIR 1954 SC 208), was a case of nomination being proposed and seconded by Government servants and the Supreme Court held that the Government servants were only performing their rights as normal citizens as entitled to under Section 33 (2) and hence it was not a corrupt practice under Section 123 (8). This was followed in Sathya Dev vs. Padam Dev (AIR 1954 SC 587).

70. Likewise in Mahendra Kumar vs. Vidyavathi (AIR 1956 SC 315), the appointment of a Government servant as the polling agent of a candidate was also held as not contravening Section 123 (8). The appointment of polling agent was held to be only for the purpose of identifying the voters and not for exploiting the situation or for furthering the prospects of the candidate in the election. But if he does any canvassing work, it would be a corrupt practice.

71. But when a new proviso under Section 123 (7) was enacted and as it stood earlier, an explanation was incorporated holding that a person shall be deemed to assist in furtherance of the prospects of the candidate, if he acts as an election agent or a polling agent of that candidate. In view of the amended statutory provision as it existed then, the Supreme Court held in Dr.Y.S.Parmar vs. H.S.Pal (AIR 1959 SC 244) that ingredients of Section 123 (7) were established.

72. I am not dealing with the following cases which were cited before me as those cases were decided only in the factual background of the respective cases viz., either as (a) not disclosing sufficient material particulars and facts or (b) the candidate not being directly involved or responsible for the corrupt practice or (c) absence of proof of the allegation that it was with a view to obtain or procure the assistance of the Government Servant for the purpose of furthering the prospects of his election etc. Hence, I do not propose to discuss the following cases in detail:-

1. Lachman Singh Gill vs. Bipi Harparkash Kaur (AIR 1960 Punjab 395)
2. Dina Nath vs. Peer Mubarak (AIR 1962 J & K 28)
3. Dhartipakar vs. Rajiv Gandhi (AIR 1987 SC 1577)
4. U.S.Sasidharan vs. K.Karunakaran (AIR 1990 SC 924)
5. Narender Singh vs. Mala Ram (AIR 1999 SC 3655)
6. Narendra vs. Manikrao (AIR 1977 SC 2171)
7. Motilal vs. Mangala Prasad (AIR 1958 Allahabad 794)
8. Hardwari Lal vs. Kanwal Singh (AIR 1972 SC 515)
9. Azhar Hussain vs. Rajiv Gandhi (AIR 1986 SC 1253)
10. Ramachandran vs. K.P.Noordeen (AIR 1988 Kerala 141)
12. Laxmi Narayan Nayak vs. Ramanathan Chaturvedi (AIR 1991 SC 2001)

73. In the case of Smt.Indira Nehru Gandhi vs. Raj Narain (AIR 197 5 SC 2299), the election petitioner had raised a contention that the returned candidate had obtained the assistance of the Officers of the U.P. Government for construction of rostrums and for arrangement of supply of power for loud speakers in the election meetings addressed by the returned candidate. The said contention was not factually disputed but the Supreme Court on their interpretation of Section 123 (7) and also in the light of the proviso, held that such arrangements and facilities for security, law and order cannot amount to corrupt practice. On facts, it was found that while the expenses for the security arrangements, erections and lightings were made by the Government and the Police, other expenses relating to public address system and decorative arrangements were borne by the party. The Supreme Court drew a distinction between action by Government servants in public interest as opposed to the private interest of the candidate and held thus:

"237. So far as the newly added proviso to Section 123 (7) is concerned, it may be stated that the act in the discharge or purported discharge of official duty of the Government employees referred to above would in the very nature of things have to be of a kind which is germane to their official duties. It may include steps taken by the Government employees for maintenance of law and order or in connection with the security of a candidate or other persons. It would not, however, include canvassing or doing such acts which may properly be considered to be part of the election propaganda for furtherance of the prospects of a candidate's election.
.. ..
What would be permissible under the above provision would be that which is conceived to be done in public interest and not something conceived to be done in the personal interest of a candidate. In spite of some difficulty which may arise in borderline cases, this distinction must be borne in mind. If, however, because of doing something conceived in public interest, e.g., as in the present case the security arrangement for the person holding the office of the Prime Minister, some advantage may also possibly accrue to a candidate, it will have to be regarded as incidental and would not detract from action taken under the above provision being in public interest. As against that, any action taken with a view to further the personal interest of a candidate should not be allowed to be camouflaged as an action taken in public interest. Care must be taken to ensure that public interest is not allowed to degenerate into a cloak for furtherance of the personal interests of a candidate in an election. The discharge or purported discharge of official duty must necessarily have public interest and not the personal interest of a candidate as its basis. The Courts while dealing with the newly added proviso to Section 123 (7) should construe it, if reasonably possible, in such a manner as would sustain the validity of that proviso. In case there is abuse of the above provision, the proper course, as already mentioned, would be to strike down the action taken under the proviso and not the proviso itself".

74. I am therefore inclined to hold that the object of the provision under Section 123 (7) is to prevent the Government machinery or the official influence of a Government servant being used for the furtherance of the success of the candidate, in order to maintain purity of election. If the action of the Government servant is intended to benefit the

private interest of the candidate, then it will be covered under the provision.

75. In the present case, the nature of assistance rendered by the P.O and the admitted facts surrounding the casting of vote by the second respondent would clearly bring out that the allegation cannot be rejected either on the ground of lack of pleadings or evidence or that the candidate was not directly responsible for procuring the assistance or that it was only in public interest and not in the private interest of the candidate. Nor is it a case of Government servant himself having done something on his own without being solicited by the candidate. In fact, the attempt on the part of the respondent originally was to make it appear as though the P.O on his own initiative had asked him to vote without he himself asking for it. In para-4 of the affidavit filed by the second respondent in support of his application to strike out the election petition, he contended as if on entering into the booth he was asked by the P.O whether he was a voter in the Constituency and that in spite of the second respondent telling him that he was not a voter, the P.O had told him that he could cast his vote. He would also state that the P.O had filed an affidavit to the effect that he had personally permitted the second respondent to cast his vote and hence the respondent would contend that he never procured or obtained the assistance of the P.O. In para-9 he would again state categorically that he never asked the P.O whether he could vote in that booth nor did he seek his assistance and would again refer to the affidavit alleged to have been given by the P.O. Having said so categorically in the said affidavit, in the written statement also filed by him later, in para-4 he would make it appear as though the P.O had first voluntarily asked him whether he was a voter and even after his telling the P.O that he was not a voter, the P.O had told him that he can cast his vote. In paragraphs-8 and 11 also he has repeated the same and would positively state that he never asked the P.O whether he could vote in that booth, nor did he express his desire to the P.O to cast his vote in that booth. His statement in the affidavit and the written statement had been made presumably on legal advice in an attempt to make it appear as if the P.O had himself volunteered and asked the second respondent to vote without the candidate himself soliciting or making any demand. But when he deposed as a witness, in the chief-examination itself he has admitted that when he went inside the booth he wanted to know who was the P.O and when the P.O was introduced, he showed him the Certificate issued by the R.D.O, Ponneri and wanted to know whether he could cast his vote. The P.O, thereafter consulted other Polling Officers and subsequently directed them to give the ballot paper. In the cross-examination also, he has repeated the same. To a specific question as to whether the P.O cooperated with him and allowed him to cast his vote, he replied that when he asked the P.O whether he could vote in that booth based on the Certificate, the P.O consulted the other Polling Officers and permitted him to cast his vote. I am referring to this particular aspect of the defence by the second respondent only to show that it is not the case of the second respondent that the assistance of the P.O was rendered by him voluntarily on his own without the second respondent having himself sought the assistance of the P.O. Therefore, the rulings relied on by the learned Senior Counsel for the second respondent in which the Courts have dealt with cases where the candidate had not by himself solicited any

assistance, will not apply to the present case. Even though the earlier attempt in the pleadings appear to be aimed at such a defence, however in the witness box the second respondent had clearly stated that it was he who had approached the P.O by himself with a demand to be permitted to cast his vote, on the basis of an alleged Certificate obtained by him from R.D.O, Ponneri.

76. Hence none of the judgments cited above arising under Section 123 (7) would apply to the present case, the facts of which are unique and peculiar and thus have to be decided on a proper analysis of the evidence.

77. On the side of the petitioner, I have already stated that P.W.1 is only a hear-say witness. P.W.2, who is the election agent of P.W.1 clearly states that the second respondent accompanied by his supporters came to the booth and the second respondent approached the P. O and after some exchange of words, he was allowed to vote. In the cross-examination also, he has asserted the same facts and his evidence has not been discredited in any manner. His evidence is also corroborated in vital details by the evidence of P.W.3 who is the polling agent of the first respondent. The only shadow which is the sought to be a cast against P.W.2 is that he had not given any immediate complaint to the police or the election authorities. An acceptable reply is given by the witness viz., that the polling was over only on 5.00 p.m. On that day (5.9.1999) he along with others were continuously receiving reports from various parts of the Constituency, which had to be dealt with and that he was in the process of receiving and dealing with such information, till late in the night. Later, he was tired and at about 3.00 a.m. On 6.9.1999, he was arrested by the police. He was released only on 13th or 14th. Subsequently, after consultation with the candidate and his Advocate, he gave a complaint on 30.10.19 99. In the mean time, the issue had also been taken up by others viz., the first respondent, the Communist party of India and the petitioner himself and also widely discussed and debated in the newspapers, and the factum of casting of vote was admitted by the second respondent himself. Therefore, the fact that the complaint by P.W.2 was given belatedly cannot be treated as in a criminal case in which delay in filing of First Information Report should result in discrediting the prosecution case. As stated earlier, the issue had been taken up by the others even before P.W.2 was released from the custody of the police. Therefore the only fact of belated giving of the complaint by P.W.2 cannot result in discrediting his evidence.

78. P.W.3 is an independent witness, who was the polling agent of the first respondent, who belongs to the Congress party, which was opposed to both the petitioner and the second respondent. He has no axe to grind in favour of the petitioner and therefore, he is an independent witness. Even if P.W.2's presence could be doubted, P.W.3's presence cannot be doubted as he was the polling agent for booth No.42 as could be seen from Ex.P.9. The fact that P.W.3 was the polling agent is not seriously disputed or questioned by the second respondent except to suggest that Ex.P.9 did not contain the seal of the P.O. His objection has no basis considering that it contains the signature of the P.O. Therefore his presence inside the booth throughout the polling is natural and he has spoken to the facts and

circumstances relating to the incident as had already been mentioned above. No dent is created in the cross-examination and in fact, there is not even a suggestion in the cross-examination that his statement that he has objected to the voting by the second respondent and that he was shouted down by supporters of the second respondent, was false. Likewise, even with reference to his statement that on the refusal by the P.O to allow the second respondent to vote, the second respondent had taken him aside and after talking to him, the second respondent was allowed to vote, also, no suggestion to the contra had been made in the cross examination. Hence PW.3's evidence is very crucial in proving the petition allegations.

79. A general comment was made by the learned Senior Counsel for the respondent as regards the evidence of P.Ws.2 and 3 that according to both of them, the incident took place at about 11.00 a.m., whereas the second respondent had actually cast his vote around 8.00 a.m., and that the said discrepancy in the timing would clearly show that both of them were not speaking the truth. At this stage, it is relevant to point out that there is no other evidence on the side of the second respondent as to when exactly he came to booth No.42 to cast his vote apart from his own interested statement. There is no supporting evidence, oral or documentary to show that he voted only around 8.00 a.m. The only reference which is made to, is to the report sent by C.W.1 to the Chief Election Commissioner, New Delhi-Exs.C.1 series. In Ex.C.1 series, the timing is mentioned as 7.15 a.m., and even the said timing is not consistent with the claim of the second respondent. He would state that he went to the polling booth around 8.00 a.m. It is also pertinent to note that in the written statement he has not mentioned any time. If one goes into the report of C.W.1 in detail, it could be seen that part of the report is in favour of the petitioner and partly in favour of the respondent. But as long as the Returning Officer/Assistant Returning Officer, who is said to have conducted a discreet enquiry and on whose report Ex.C.1 series are based are not examined as witnesses, and their actual reports have not been filed, Ex.C.1 reports cannot be accepted. In fact CW.1 has stated that he does not know about the incident personally and that the reports were based only on the reports sent by the Returning Officer/ Assistant Returning Officer. Therefore, nothing seriously turns on the alleged contradiction between the timings mentioned by P.Ws.1 to 3 on the one hand and R.W.1 on the other hand, more so, when there is no independent evidence to support the statement of the second respondent. It is also possible as pointed out by the learned Senior Counsel for the petitioner that the timing as mentioned by RW.1 now was only to suit his convenience after having seen the evidence of P.Ws.1 to 3. He could have examined Dr.Govindasamy who belongs to his own party and had admittedly accompanied him when he entered into the polling station/college premises to establish the actual time when he had cast his vote. The evidence on the side of the petitioner is consistent and if it is to be disproved, the second respondent ought to have let in rebuttal evidence, which has not been done.

80. In the above back ground of the evidence on behalf of the petitioner, it is irresistible that a proper case is made out against the second respondent having secured the assistance of the P.O. I have already mentioned on the basis of the judgments of the Supreme Court that

as far as the election petitions are concerned, when the basic ingredients are established by the petitioner on essential particulars, then the burden would shift to the respondent and it has to be seen how far the second respondent had discharged his share of the burden namely, by letting in satisfactory rebuttal evidence sufficient enough to discredit the evidence of PW.2 and PW.3. On the other hand, the evidence of RW.1 discloses few clear admissions with reference to his conduct which by themselves would be sufficient to constitute a corrupt practice under Section 123 (7). It is only in respect of certain allegations or events which are alleged to have taken place, which are ancillary to main conduct of the second respondent having approached the P.O and having secured his assistance, there is disagreement between the evidence of PW.2 and PW.3 on the one hand and that of RW.2 on the other hand. For instance, the evidence of PW.2 and PW.3 of the second respondent having behaved in a rough and tough manner with the P.O and taking him aside and inducing the P.O to agree for his request, RW.1 would not agree with the said version of PW.2 and PW.3. In the face of the evidence of PW.2 and PW.3, the need for rebuttal evidence by the second respondent cannot be denied. In his oral evidence, RW.1 admits the following events which could be easily inferred from his own narration of events and also the defects in his evidence.

i) He goes inside the booth and asks for the P.O so far there is nothing wrong for a candidate to enter a booth or to discuss with the P.O on any matter touching the poll or for making any legitimate representation. But the purpose of his confronting the P.O is for a different purpose. He shows the "Certificate" said to have been issued by the R.D.O and wants to know whether he could cast his vote.

ii) The P.O does not readily agree on being told that the second respondent is not a voter in the Constituency, but he consults the Polling Officers and only later agrees and instructs the Polling Officer to give the last sheet of the ballot paper. It is very obvious that the P.O is fully aware that what he is doing is not proper, but he is forced by circumstances.

iii) There is a vital contradiction between his pleading and his evidence as pointed out earlier. In the pleading, he would make it appear as though the P.O himself initiated and volunteered to the second respondent that he can vote in that booth. The fact that it was the second respondent who had asked the P.O to allow him to vote is also substantiated by his own statement in the press published in " Dinakaran" on 18.10.1999 Ex.P.5. He claims that he did not commit any mistake by voting at Virudhachalam, even though he was not a voter in that Constituency and that for the said purpose he had obtained a Certificate from R.D.O, Ponneri and that on the strength of the same he had asked the P.O to allow him to vote and that the P.O allowed him to vote only after obtaining the said Certificate. The said statement has been given in his name and was never denied by him subsequently and hence admissible in evidence.

iv. As pointed out by the learned Senior Counsel for the petitioner, the second respondent had repeatedly mentioned about the Certificate obtained by him from the R.D.O, Ponneri, certifying that he could

vote at Virudhachalam also and that it was only on the strength of the said Certificate, the P.O also had agreed to allow him to vote. But the said Certificate had not seen the light of the day till now. The respondent did not also take any step to summon the same which would have exposed the role played by the R.D.O, Ponneri in this episode. This Certificate about which the second respondent had repeatedly mentioned both in his pleadings and evidence, has not been produced before this Court or attempted to be summoned by the second respondent, if it had been handed over to the P.O. On the other hand, a feeble and half hearted attempt was made to make it appear as though it was only the Certificate issued by the R.D.O, Ponneri along with the Certified copy of the electoral roll of Villivakkam Constituency which he had used, while filing his nomination for Chidambaram Parliamentary Constituency. This cannot be true having regard to his own positive pleading and also the oral evidence that he had obtained a Certificate to the effect that he can vote at Virudhachalam also and that the said Certificate was mainly responsible for convincing the P.O. That apart, the Certificate of the electoral roll obtained and produced for the purpose of Section 33 (5), is to be filed along with the nomination paper or be produced before the Returning Officer at the time of scrutiny of nomination paper. The requirement under Section 33 (5) has been held to be mandatory and when once filed becomes a part of the record along with his nomination. Therefore there is no possibility of producing the same Certificate before the P.O much later. Moreover the said Certificate is issued only for the purpose of filing the nomination and not for casting the vote at Virudhachalam. The second respondent had repeatedly pointed out of having produced a Certificate before the P.O only for the purpose of permitting him to vote at Virudhachalam. Neither in the evidence nor even in the course of arguments was there any attempt to explain the real tenor of this mysterious Certificate said to have been obtained from R.D.O, Ponneri. It is an issue which is within the special

knowledge of the second respondent and he should have discharged his onus by properly clarifying the same, which has not been complied with though the issue had been raised in the election petition itself.

v. If the respondent had not threatened or brought any pressure upon the P.O, nothing prevented him from taking steps to summon the P. O to clarify as to what exactly happened inside the booth and in order to rebut the evidence on the side of the petitioner. On the contrary, surprisingly when the P.O had to be summoned as a Court witness at a later stage in connection with the additional issue, the respondent had insisted that the witness should be examined only in the context of the additional issue and he should not be examined with reference to the other issues.

vi. PW.2 has stated that one Dr.Govindaswamy had accompanied the second respondent when he came inside the booth and that he also cast vote along with the second respondent, though he cannot say whether Dr.Govindaswamy was a voter in the booth or not. But the respondent in his evidence in the chief-examination would state that he entered into the booth alone. In the cross-examination he would state that when he went to booth No.42, Dr.Govindaswamy came along with his wife and went to one of the six polling booths. In order to disown his acquaintance with Dr.Govindaswamy, the

second respondent would say that he heard Dr.Govindaswamy was a medical practitioner and he does not know what was the position Dr.Govindaswamy was occupying in the P.M.K. Party. The fact that Dr.Govindaswamy had accompanied him inside the polling booth has been stated in Ex.P.3 complaint itself and in the evidence of PW.2. PW.2 has stated that Dr.Govindaswamy was the sitting M.L.A of Virudhachalam Constituency. It is rather strange and artificial that the second respondent should make it appear as though he was not acquainted with him. This he had stated obviously for the reason to make it appear as though he was not accompanied with any of his partymen when he went inside the booth.

vii. Last but not the least, the admission by the second respondent which is as follows, cuts at the root of the defences put forward by the second respondent that whatever he did was only due to his ignorance of the rule position and that he merely wanted to ascertain whether in law he was entitled to vote at Virudhachalam. The following is his statement in his oral evidence "Even when I filed my nomination papers, I was aware that I could not cast my vote in Chidambaram Parliament Constituency". The above statement totally belies his claim of ignorance of law. Though ignorance of law is not an excuse, it would atleast mitigate the misconduct to a great extent. But even the said defence is lost by his own statement as above. It not only deprives him of the defence of ignorance of law but is also a proof of the fact that he had chosen to deliberately violate the law with impunity by utilising the services of P.O. He also poses for a photographs showing him casting the vote inside the ballot box which are published in the newspaper Ex.P.5. The entire series of action of the second respondent of obtaining Certificate from the R.D.O choosing booth No.42 and going there accompanied with his supporters and photographer, pressurises the P.O to submit to his request and cast the vote, knowing fully well that he cannot vote at Virudhachalam Constituency, clearly establish a pre-planned course of action to cast vote at Virudhachalam at any cost by obtaining and procuring the services of a Government servant.

81. All the aforesaid features would show that apart from the fact that the petitioner's case is clearly supported by PW.2 and PW.3, in contrast, the second respondent had not tendered satisfactory evidence not to mention the contradictions with his own pleadings. He has also not let in any independent oral evidence apart from himself. He could have examined Dr.Govindaswamy, who belongs to his own party to disprove the evidence of PW.2 and PW.3. He could have taken out summons to examine the P.O to speak about what actually happened inside the booth, if really no illegal activity had taken place. He could have taken subpoena to summon the Certificate alleged to have been issued by the R.D.O, Ponneri, if really there was no incriminating material in the said Certificate and the affidavit said to have been sworn to by the P.O. In short, the second respondent has not made any attempt to repudiate or rebut the evidence of Pws.1 to 3 on vital particulars except his own interested testimony and had not made any attempt to let in evidence on issues which are specially within his knowledge, which leaves the Court without any other alternative except to accept the testimony of Pws.1 to 3.

82. Whether the evidence on the side of the petitioner is sufficient to make out a case for sustaining the allegations of corrupt practice as envisaged under Section 123 (7), has to be analysed. What is required under the said provision is the obtaining or procuring the assistance of the services of the concerned individual for the furtherance of the prospects of the candidates election. As already stated, the object of the provision is that the candidates ought not to be permitted to utilise the services of Government servants and to prevent the Government machinery being used by them. The executive is a powerful wing of the Government and it is they who conduct the election. The officials in the services of the Government have enormous power and discretion and if their power is to be used by one of the contesting candidates, it would result in unfair advantage to him and unfair disadvantage to his opponent. The provision is enacted only with the said reasons behind it with the laudable objective of placing an embargo on the candidates for procuring or obtaining the services of the Officers in power. The criteria is not whether the said action would have made any difference to the ultimate result of the election, as the learned Senior Counsel for the respondent sought to contend. That is the reason why corrupt practices under Chapter-I of PartVII have been placed under Section 100 (1) (b) of the Act, which on proof is sufficient to hold the election of the returned candidate as void. The parliament in its wisdom had thought it fit to classify the misconduct of procuring the services of a Government servant as a grave offence and corrupt practice, which should entail the penalty of setting aside the election. The parliament has rightly felt so, since fair election is of utmost importance to a healthy democracy. When people in power commit mistakes, the only way undesirable individuals can be kept out of governance of the State is the election to be held once in five years. If elections cannot be held fairly, the situation would cut at the root of democracy and that is the reason why the parliament had intentionally classified a set of misconduct on the part of the candidates as grave and capital which should result in disqualification or setting aside the election as void. Certain other types of minor misconduct are classified as electoral offences and not so serious offences, the proof of which alone is not sufficient to set aside and hold the election as void. Such instances of misconduct are categorised under Section 100 (1) (d) and as regards those offences it is not just sufficient to prove such misconduct alone, but the election petitioner should also establish that the commission of such misconduct had in fact materially affected the result of the election, as envisaged under Section 100 (1) (d) (iv). Therefore, the parliament had very clearly visualised and drawn a clear line between serious misconduct of corrupt practice which should result in setting aside the entire election and other types of minor misconduct where it should be shown that the misconduct had materially contributed to the success of the candidate. Therefore, while dealing with the misconduct under Section 123 (7), it is not for the Court or for the anybody to be swayed by any thought that the misconduct was inconsequential and need not result in setting aside the election.

83. If the said corrupt practice is to be categorised as a serious one, then I think the instance of misconduct alleged in this case would be the worst example of a corrupt practice under Section 123 (7). It will not be an exaggeration to say that the polling booth is the most

important place where the fate of democracy is to be decided. The Presiding Officer is the master of the polling booth and he is the principal official in charge of the polling booth. He holds a very unique position in the conduct of the election and if his services could be utilised by the candidate to his advantage, that would be the worst example of a corrupt practice under Section 123 (7). The power and the discretion which a P.O is vested with are illustrated below:-

i. He is appointed under Section 26 for each polling station, which may contain number of booths.

ii. It is the duty of the P.O to maintain order at the polling station and under Section 27, it is his duty to "see that the poll is fairly taken".

iii. Though Polling Officers are appointed by the District Election Officer, if any Polling Officer is absent or on leave, the P.O is vested with the power to appoint a Polling Officer.

iv. Under Rule 13 of the Conduct of Election Rules, 1961, hereinafter called the Rules, no polling agent shall be admitted into the polling station, unless he has delivered to the P.O the instrument of his appointment under Form-10 by signing the declaration before the P.O.

v. Under Rule 32, he should regulate the number of voters to be admitted into the polling station and shall exclude persons other than those who fall under specific categories of individuals mentioned thereunder.

vi. While sealing the ballot box, the P.O shall affix his signature on the seal and then secure and seal the ballot box. He will also demonstrate to the polling agents that the ballot box is empty. The ballot box shall then be closed, sealed, secured and placed in full view of the P.O and the polling agents. Under Rule 33-A, he shall demonstrate to the polling agents that the copy of the electoral roll does not contain any entry other than as required under the rules.

vii. It is the duty of the P.O to regulate the admission of men and women voters in separate batches and also to appoint women to serve as attendants to assist the women voters-Rule-34.

viii. The P.O in his discretion may employ any person at the polling station as he thinks fit to help in the identification of the voters or otherwise assisting in the conduct of the poll. He has to check the name of the voters and other particulars. He is also given the discretion to overlook minor clerical errors or printing mistakes in the electoral roll, if he is satisfied that the identity of the voters is properly established-Rule 35. However, whenever a polling agent challenges the identity of the person claiming to be the elector, the P.O shall hold a summary enquiry into the challenge and for that purpose, he may require both sides to adduce evidence by administering oath to the person offering to give evidence and after

enquiry may either allow the person to vote or debar him from voting-Rule 36.

ix. Every ballot paper before it is issued to the elector and the counterfoil attached thereto shall be stamped on the back side before it is issued and shall be signed in full by the P.O. The P.O is also responsible to ensure secrecy of the voting by the elector-Rules 3 8 and 39.

x. In the event of a voter being blind or suffering from other physical infirmities or not being able to recognise the symbols, the P. O shall permit the voter to be accompanied by a companion. The P.O shall also keep a record of such votes under Form-14 (A)-Rule 40.

xi. If a ballot paper cannot be used due to any inadvertent action by the elector, the P.O on being satisfied with such inadvertence, give another ballot paper and all such returned ballot papers along with the counterfoil shall be kept in a separate packet-Rule 41.

xii. In the event of an elector claiming that he is the proper person/elector, but such vote had already been polled by another person, the P.O can satisfy himself about the correctness of the claim after questioning the elector and supply a ballot paper (Tendered votes) to the elector and shall maintain a proper list under Form-15-Rule 42.

xiii. At the hour fixed, the P.O shall close the polling station and shall not admit any voter thereafter, but allow the voters inside the polling station to cast their votes-Rule 43.

xiv. After the closing of the poll, the P.O shall close and seal the slit of the ballot box and keep it sealed and secured or otherwise in accordance with the instructions by the Election Commission, transfer of the ballot papers into a bag, cover and seal the bag-Rule 44.

xv. The P.O shall also maintain an account of the ballot papers under Form No.16 and furnish a true copy of the entries to every polling agent present. He shall then put into separate packets containing various materials as mentioned in Rule-46 and each such packet shall be sealed with the seals of the P.O-Rules 45 and 46.

xvi. Thereafter, he shall deliver to the Returning Officer, the ballot boxes, the ballot paper account, sealed packets and all other records relating to the poll-Rule 47.

xvii. The P.O is also entitled to enter into any polling compartment to ensure that the ballot boxes are not tampered or interfered with. If any ballot paper is found not inserted into the ballot box but is found anywhere in the polling station, the P.O shall treat the same as "returned-cancelled" □ Rules 42 B and C.

xviii. In the event of usage of Electronic Voting Machines (E.V.M.), the P.O is required to demonstrate to the polling agents and also

should properly control the unit and seal the E.V.M, which shall be kept in full view of the P.O Rule 49 E. With regard to polling by E.V.M, all the rules relating to the usage of ballot boxes are also incorporated under Rule 49 F to 49 W. In case, the P.O is of the opinion that booth capturing was taking place, he shall immediately close the control unit of the E.V.M and to ensure that no further votes can be recorded and shall detach the same from the control unit-Rule 49 X.

xix. A perusal of the various forms such as Form Nos.14, 15, 16, 16 -A, 17-A, 17-B and 17-C would show that all such forms are connected with the various stages during the poll are to be prepared and signed by the P.O.

84. The reason why I have referred in a detailed manner to the above issue of the powers and wide discretion of the P.O is to emphasise the fact of the unique and powerful position of the P.O in the matter of conduct of election. It would not be an exaggeration to say that he is the sole guardian of fair election and on him depends entire process of fairness in the election inside his polling station. The entire hierarchy of the Election Commission, namely, right from the Chief Election Commissioner to the last grade staff in the machinery of holding the elections, all of them are concerned only about the situation both prior to and after the conduct of the election and after the ballot boxes leave the polling stations. But the most vital moment in the conduct of election is the polling day and what happens inside the polling station when the polling actually takes place. That part to the election process is the most vital and hence if only one Government servant can be brought under Section 123 (7), it is the P.O of a polling station. In fact all the other categories of Officers mentioned under Section 123 (a) to (h) are comparatively insignificant, if not absolutely irrelevant. I wonder what can the stipendiary Judges or Magistrates or members of the armed forces of Union or Excise Officers do to pollute the election process or do something affecting the fair conduct of the election. The foremost and relevant official under Section 123 (7) would be the P.O of a polling station.

85. As stated earlier, the issue is not to be tested from the angle as to whether a single vote polled into the ballot box illegally should result in setting aside the election. Apart from the statutory mandate flowing from Sections 100 and 123 of the Act, it is the nature of the misconduct or corrupt practice which is relevant to be considered. In recent judgments, the Supreme Court had been strongly emphasising the need for maintenance of purity in elections and even to ensure that candidates have proper antecedents. Purity in elections are becoming slowly eroded by three sources of power-money, muscle and power of office. Though the Election Commission at its highest level enjoys and maintains autonomy and independence, yet at the operational level/lower level especially, the machinery which is relevant for the actual conduct of the poll on the polling date which is the most crucial stage of the entire democratic process, of late, the three sources of power are slowly taking over control. In many third world countries, elections are found to be an eye wash or farce. If it should be avoided in our country, the election tribunals have to step in to put an end to such show of power inside the polling booth and if not, purity of elections can never be maintained. Only for the purpose of illustrating

how officials at the lower levels are discharging their duties, I would refer to one aspect of this case itself, namely, the reports of the Assistant Returning Officer, who is said to have conducted an enquiry into the episode of the second respondent having cast his vote at Virudhachalam to which reference is made to in Ex. C.1 series. The first report is strongly worded against the conduct of both the second respondent as well as the P.O and recommends strong action to be taken against both. The second report talks about the two mitigating factors in favour of the second respondent namely, the fact that the P.O had given the ballot paper and that the polling in the booth was covered by video. The third report also mentions that action should be taken against the P.O and as regards the second respondent, it is stated that there are two mitigating circumstances viz., (1) that the polling was covered by video and (2) that the circumstances lead to the presumption that the second respondent had genuinely thought that he could vote anywhere on the strength of the certified copy of the electoral roll issued by R.D.O, Ponneri. It is very easy to guess as to why the Assistant Returning Officer who had submitted the report is straining himself to give a report in favour of the second respondent who by that time had become a member of the union cabinet. In these type of cases, it is the candidate who should be dealt with severely than the P.O who is forced to be a party to the illegal conduct due to pressure and coercion. In fact, Section 136 of the Representation of People Act and Section 171 (F) of Indian Penal Code are to be invoked mainly against the candidate or his supporters, who really violate the legal provisions. The Assistant Returning Officer on the other hand, recommends strong action to be taken only against the P.O, and would plead the case of the candidate by referring to non-existent mitigating circumstances. When the candidate himself admits that he was fully aware that he cannot vote at Virudhachalam, the Assistant Returning Officer pleads for him by stating that the facts give raise to a presumption that the second respondent had genuinely thought that he can cast his vote. It is not known under what circumstances or what was the provocation for the Assistant Returning Officer to explore and invent mitigating circumstances in favour of the second respondent. I have already held that the report under Ex.C.1 series cannot be looked into since the Assistant Returning Officer, who is said to have conducted the enquiry and had sent the report had not been examined as a witness. I am referring to the report only to highlight the quality of the report which reflects the manner in which the official machinery at the lower level functions either under pressure or for extraneous reasons. Therefore, it becomes all the more necessary to enforce the provisions under Section 123 (7) very stringently and any undue influence by the candidate on the P.O has to be viewed as the most serious example of a corrupt practice under Section 123 (7).

86. Here is a case where a candidate who is seeking his election with a motive to win the election at any cost, knowing fully well that he cannot vote at Virudhachalam Constituency, nevertheless obtains the Certificate from the R.D.O, Ponneri, certifying that he can vote at Virudhachalam and with impunity enters into the booth and demands that he be allowed to vote. The P.O after being told that he is not a voter in the Constituency does not readily agree to allow the respondent to vote. There upon the second respondent shows the Certificate said to have been issued by R.D.O, Ponneri and demands that he be allowed to vote. There is a discussion, R.D.O and the P.O and the Polling Officers and ultimately the P.O obliges by

asking the Polling Officer to issue the last sheet of the ballot paper book and he is allowed to vote.

87. In the above mentioned narration, I have completely restricted myself to the admitted version of the episode by the second respondent himself and I have completely eschewed the evidence of P.W.2 and P.W.3. I have asked myself this question several times as to whether the said facts are sufficient to make out a case of corrupt practice under Section 123 (7). I am inclined to feel that if the provision is to be interpreted in a purposeful manner, with a motive to maintain purity of elections, the question has to be answered affirmatively. As I had stated earlier, the polling booth is the place where the fate of true democracy is decided and the P.O being the master of the polling booth, if he could be induced to do something illegal by allowing a candidate to commit an illegal act, there cannot be a more serious and harmful example of corrupt practice under Section 123 (7). This illegal action is by the candidate himself and not by his agent or any one without his consent/permission or knowledge. This is also not a case of the candidate having acted due to any ignorance. Admittedly he was fully aware of the fact that he cannot vote at Virudhachalam Constituency.

88. When we devote further consideration of the incident in the light of the uncontroverted and unrebutted evidence of P.W.2 and P.W.3, the grave nature of illegal conduct on the part of the second respondent assumes greater proportion and highly deplorable.

89. I have therefore no doubt in my mind that the petitioner had made out on facts a clear case of corrupt practice against the second respondent under Section 123 (7) and I find this issue in favour of the petitioner. This finding is however subject to the finding on Additional Issue No.1.

90. Additional Issue No.1:- I have already dealt with the circumstances under which I had to permit this issue being framed at a very late stage in the course of arguments as raised by the learned Senior Counsel for the second respondent in view of the fact that the point thus raised goes to the very root of the applicability of Section 123 (7) to the P.O in this case. The crux of the objection is that the P.O does not fall under any of the categories of Officers/Government Servants mentioned under Section 123 (7) and therefore even if a case of corrupt practice is made out to the effect that the second respondent did utilise the services of the P.O of booth No.42, nevertheless as the P.O does not fall under any of the categories, the charge against the second respondent has to fail. It is positively asserted by the second respondent that the P.O at the time of the poll was only a B.T. Assistant and he cannot be considered to be a Government Servant much less a Gazetted Officer.

91. On the contrary, the contention of the learned Senior Counsel for the petitioner is that the P.O was working in a Government High School and he is a Government Servant. A Gazetted Officer is not defined anywhere in the Service Rules and going by the pay structure, he was drawing more than Rs.9,000/- which clearly puts him above the rank of a Gazetted Officer. At the time of the poll, he was a Special Grade B.T. Assistant and hence equivalent to a Gazetted Officer. He would further submit that the

object of Section 123 (7) was to prevent the misuse of Government machinery and the executive power by the contestants, and if the P.O who plays the pivotol role in the fair conduct of the election inside the polling booth is to be excluded from the category of officials enumerated under Section 123 (7), the very provision itself is rendered ineffective and a dead letter. The provision has to be interpreted in such a manner as to include all the election staff utilised by the Election Commission failing which purity of elections cannot be maintained. It is further pointed out that B.T. Assistants are also permitted to sign or attest documents which could be done only by Gazetted Officers and hence the P.O is positively a Gazetted Officer.

92. The provisions of Section 123 (7) was inserted by amendment in the year 1956 and prior to the amendment, the said corrupt practice was envisaged under Section 123 (8). Section 123 (8) as it stood then is as follows:-

"(8) The obtaining or procuring or abetting or attempting to obtain or procure by a candidate or his agent or, by any other person with the connivance of a candidate or his agent, any assistance for the furtherance of the prospects of the candidate's election from any person serving under the Government of India or the Government of any State other than the giving of vote by such person.

EXPLANATION: For the purposes of this clause-
(a) a person serving under the Government of India shall not include any person who has been declared by the Central Government to be a person to whom the provisions of this clause shall not apply;

(b) a person serving under the Government of any State shall include a patwari, chaukidar, defedar, zaildar, shanbagh, karnam, talati, talari, patil, village munsif, village headman or any other village officer, by whatever name he is called, employed in that State, whether the office he holds is a wholetime office or not, but shall not include any person (other than any such village officer as aforesaid) who has been declared by the State Government to be a person to whom the provisions of this clause shall not apply"

93. A reading of Section 123 (8) as it stood earlier, would indicate that it had a wider application, covering a very wide field of Government Servants referring almost to every person serving under the Government of India or the State Government, unless such person was specifically declared as a category to whom the provision shall not apply. The provision as it stands now viz., Section 123 (7), shall apply only to persons belonging to the specific named categories of persons falling under clauses (a) to (g). The Supreme Court while dealing with the said provision in Raja Bahadur vs. Raghunath Mishra and Others (AIR 1959 SC 589) has categorically held that the provision would apply only in respect of persons specifically mentioned under Section 123 (7) and to none else. The issue which arose for consideration in that case is whether a Sarpanch of Grama Panchayat would fall under Section 123 (7) (f) and the Supreme Court held that

he would not fall under any of the categories.

94. In Hari Shankar vs. Sibbanlal (AIR 1956 SC 314), while interpreting Section 123 (8) as it stood prior to the amendment, a Constitution Bench of the Supreme Court held that a village mukhia would fall under the categories mentioned under Section 123 (8). The argument by the respondent was that a village mukhia was not paid by the State Government and hence cannot be stated to be under the service of the Government, was rejected and the Supreme Court held that he definitely fell within the categories mentioned under the provision.

95. In Lalgibhai vs. Vinod Chandra (AIR 1963 Gujarat 297), a Division Bench of the Gujarat High Court had to consider whether a Parliamentary Secretary who was attached to a Cabinet Minister would fall under Section 123 (7) and it was held that the Parliamentary Secretary cannot be considered to be a person in the service of the Government.

96. In R.Saikia vs. Tonukonwar (AIR 1990 Gauhati 41), the learned single Judge held that the Ministers, the members of parliament and members of legislator are not Officers specified under Section 123 (7).

97. The above discussion will show that to invoke the provision under Section 123 (7), it has to be positively shown that the person/ Government Servant involved should fall under any one of the categories mentioned under that provision and no one else, vide AIR 1959 SC 589 cited above. It is admitted before me by both sides, that Section 12 3 (7) (g) has not been invoked by the Government to prescribe such other class of persons in the service of the Government for the purposes of the said provision, as may be prescribed by the Government.

98. With the result, the P.O in this case has to fall under any one of the categories under the Clauses (a) to (h). It is also not in dispute that the P.O in this case will not fall under any of the categories under Clauses (b) to (h) and the only possible category is Clause (a) viz., the Gazetted Officer. Apart from the rival and conflicting claims of the parties, the P.O who has been examined as C.W.2 has stated that though he is a Government Servant, he is not a Gazetted Officer. Of course, his statement will not conclude the issue and it has to be examined as to whether the position which he was holding on the date of poll is or at least can be classified as a Gazetted Officer.

99. On the date of the election, he was a Special Grade B.T. Assistant in a Government High School. Being an employee of a Government High School, he is undoubtedly a Government Servant and hence the contention of the respondent that the P.O was not a Government Servant cannot be accepted. Yet, the petitioner has to satisfy that he falls under any one of the categories under Section 123 (7) viz., that he is a Gazetted Officer as provided under Section 123 (7) (a).

100. On the date of election, the P.O was a Selection Grade B.T. Assistant. Further on the date of election, in terms of G.O.Ms.No.427 , Finance (Pay Cell) Department, dated 28.8.1998, the pay scale of B.T. Assistant was revised and fixed at Rs.5,500-9,000 as against the old pay scale of Rs.5,000-8,000/-. As the P.O was a Special Grade B.T. Assistant, his pay scale was fixed at Rs.8,000-275-13,500 and on the date of election, he was receiving Rs.9,650/- per month.

101. The expression "Gazetted Officer" has not been defined in any of the Rules governing the services of the Government of Tamil Nadu viz., T.N. State and Subordinate Services Rules, T.N. Civil Services (Discipline and Appeal) Rules, or T.N. Government Servant Conduct Rules. Not only, there is no definition or any provision which would clearly denote who is a Gazetted Officer and who is not, but also the said categorisation of Gazetted and Non-Gazetted Officers appears to have been removed in so far as Tamil Nadu is concerned in the year 1977 itself, with the introduction of Rule-2A to the Tamil Nadu State and Subordinate Services Rules, reclassifying the services into four broad groups viz., Groups-A, B, C and D, on the basis of pay scale. Now that the definition between Gazetted and Non-Gazetted Officers had been removed, it becomes necessary to find out which are the corresponding groups which can be treated on par with the gazetted rank. Apart from the materials placed before this Court by Mr.G.Subramaniam, learned Senior Counsel for the petitioner, this Court had to independently do a research work.

102. Rule-2A of the Tamil Nadu State and Subordinate Services Rules abolishing the classification of the Gazetted Officer was introduced under G.O.Ms.No.843, Personnel and Administrative Reforms (M) Department, dated 11.7.1977. The said Government Order is extracted below with the appendix of the appointing authority and punishing authority for the revised classification of the Government Servants:-

"ORDER:-
The Tamil Nadu Administrative Reforms Commission, in its report on Secretariat Administration, has suggested, among others, that the system of gazetting higher categories of Public Servants may be given up, as it is inconsistent with the egalitarian approach towards a new social order. In the meeting of the Secretaries to Government held on 23.12.1976, it was agreed unanimously that the existing system of classification of Government Servants into Gazetted and Non-Gazetted should be abolished and they should be classified as groups A, B, C and D, as in the Government of India. The Government accept the recommendation of the Tamil Nadu Administrative Reforms Commission and hereby abolish the existing classification of Government Servants as Gazetted and Non-Gazetted with immediate effect.

2. The Government servants of this State shall henceforth be classified into four broad groups as indicated below:-

Group-A:- Government Servants on scales of pay of which the minimum is Rs.1,000/- and above.

Group-B:- Government Servants on scales
of pay of which the minimum is
Rs.400/- and above but less
than Rs.1,000/-.

Group-C:- Government Servants on scales
of pay of which the minimum is
Rs.140/- and above but less
than Rs.400/-.

Group-D:- Categories of Government
Servants who are not covered
by Groups A, B and C.

3. Instructions on amending Services Rules, prescribing Appointing Authorities, Punishing Authorities etc., will issue separately from the administrative Departments of Secretariat. Till then, the existing procedures on these aspects will continue.

(BY ORDER OF THE GOVERNOR)

V.KARTHIKEYAN,
CHIEF SECRETARY TO GOVERNMENT

APPOINTING AUTHORITY AND PUNISHING AUTHORITY FOR THE REVISED CLASSIFICATION OF GOVERNMENT SERVANTS GUIDELINES

GROUP Appointing Authority /
Punishing Authority

GROUP A
Appointing Authority Government
Punishing Authority Government for Major
Punishments, Head of
Department to impose
minor punishments on
Group.A Officers
serving under him.

GROUP-B
Appointing Authority Head of Department/
Collector/Regional
Officer.
Punishing Authority Head of Department/
Collector/Regional
Officer may impose
major punishments.
The immediate Group.A
Officers under whom
they are working may

impose Minor
punishments.

GROUP-C
Appointing Authority Regional Officer/
District Head.
Punishing Authority Regional Officer/
District Head can
impose Major
punishments, Minor
punishments can be
imposed by the Head
of Office if he is
a Group.B or Group.A
Officer.
GROUP-D
Appointing Authority Group.A to Group.C
Officers having
jurisdiction over
the office.
Punishing Authority Group.A to Group.C
Officers having
jurisdiction over
office, can
impose Major
punishments.
Minor punishments
can be imposed by
Head of Office.
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103. The above extract shows that the classification is mainly based on pay scale. The pay scale limit was being periodically changed from time to time as and when new pay scales were introduced by successive Pay Commission recommendations. The last of such Government orders as applicable on the date of the elections in the year 1999 is G.O.Ms.No.190 Personnel and Administrative Reforms (S) Department dated 30.7.1998 which is as follows:-

"ORDER:-
Consequent on the revision of scales of pay in the Government Order second read above (G.O.Ms.No.162, Finance (Pay Cell) Department, Dated 13th April, 1998) the Government direct that the classification of Government Servants ordered in the Government Order first read above (G.O.Ms.No.253, Personnel and Administrative Reforms (Per.S) Department, dated 24.5.1990) be modified as given below with effect from 01.01.1996.

Group 'A' Employees in posts in
pay scales, the minimum
of which is Rs.10,000/-
and above.

Group 'B' Employees in posts on pay
scales, the minimum of
which is Rs.5,500/- and
above but below
Rs.10,000/-.

Group 'C' Employees in posts on pay
scales, the minimum of
which is Rs.2,610/- and above but below
Rs.5,500/-.

Group 'D' Employees in posts on pay
is below Rs.2,610/-.

2. The Selection Grade/Special Grade posts will come under
the respective groups under which the posts in the ordinary grades are
classified.

3. Necessary amendment to the general Rules for the Tamil
Nadu State and Subordinate Services and Fundamental Rules will be issued
separately.
(BY ORDER OF THE GOVERNOR)
D.PRAKASH
SECRETARY TO GOVERNMENT."

104. As far as the post of B.T. Assistant is
concerned, under G.O.Ms.No.427, Finance (Pay Cell) Department, dated
28.8.1998, the existing pay scale of Rs.5,000-8,000 was revised and fixed at
Rs.5,500-9,00 0. Therefore, on a conjoint reading of the said Government
Order and G.O.Ms.No.190 dated 30.7.1998, it would be clear that the post of
B.T. Assistant would fall under Group-B. It is true that as on the date of
election, the P.O in this case was a Selection Grade B.T. Assistant and he
was drawing salary at the pay scale of Rs.8,600-275-13,500 /-. But as the
explanation to Rule-2A of Tamil Nadu State and Subordinate Services Rules
would indicate, persons holding posts in Selection Grade or Special Grade
shall come only under the respective groups under which such posts in the
ordinary grades are classified. Therefore, he will come only under Group-B
though as a Special Grade B.T. Assistant, he is governed by a higher pay
scale.

105. The next question to be considered is whether a
Government Servant under Group-B can be considered to be a "Gazetted Officer".
The essentials of the Government Servant being treated as a Gazetted Officer
can be stated as follows:-

1. Pay scale should satisfy the minimum prescribed limit for Groups-A
and B which are generally considered to be equal to the rank of Gazetted
Officers before the abolition of the category of "Government Officers".

2. The appointment should be published in the gazette.

3. It is only the Government which will be the appointing as well as the punishing authority.

4. Power to attest and certify testimonials, documents and copies of documents.

106. Among the above four requirements, an analysis of the entire issue reveals that the P.o in this case satisfies only the first requirement and not the next three requirements. On the basis of the pay scale viz., Rs.5,500-9,000, the P.O definitely falls under Group-B. There are also materials to show that generally speaking Group-A and B posts are treated on par with the categor y of Gazetted Officers for instance for the purpose of receiving loans and advances as admissible to the Government Servants under Tamil Nadu Financial Code and for attesting testimonials, Certificates etc. But the mere pay scale alone cannot be the determinative factor to find out whether the particular Government Servant is a Gazetted Officer or not. Pay scales are fixed on various other considerations and conferment of the status of the gazetted rank is also based on certain specific requirements, as listed above. Therefore, the P.O in this case has to satisfy the other requirements also.

107. As far as the second requirement of the appointment of being published in the gazette is concerned, it is true that there can be no rigid formulae that the name of a particular individual Government Servant who is appointed to a particular post should be necessarily published in the Government gazette. It is sufficient if the post is a gazetted post an there is no need to insist that the name of the individual appointed should have also been published. If a person is actually appointed to a gazetted post or a post which is equivalent to a gazetted post, the fact that his appointment had not been notified in the gazette alone will not deprive him of being a Gazetted Officer. But the post which he holds or to which he is appointed should be a gazetted post. It will be useful to bear in mind Rule-4 of the General Rules (Part-II) of the Tamil Nadu State and Subordinate Services Rules, which deals with approved candidates. Rule-4 deals with appointments and the preamble portion of Rule-4 (a) deals with the process of publication of appointments in the case of State Service and Subordinate Service. In the case of State Service, the appointments shall be

published in the Tamil Nadu Government Gazette and in the case of Subordinate Services, the appointment shall be published in the Notice Board of the Office of the appointing authority. The said Rule is as follows:-

"Rule 4(a) All first appointments to a service or class or category or grade thereof, State or Subordinate, whether by direct recruitment or by recruitment by transfer or by promotion, shall be made by the appointing authority from a list of approved candidates. All appointments made by transfer from one class to another class and from one category to another category in the same service carrying identical scale of pay shall be made by the appointing authority from a list of approved candidates. Such list shall be prepared in the prescribed manner by the appointing authority or any other authority empowered in the Special Rules in that behalf and shall be published in the Tamil Nadu

Government Gazette in respect of appointments to State Services and in the Notice Board in the office of the appointing authority in respect of appointments to Subordinate Services. The list shall also be communicated to all persons concerned by Registered Post whose names are found in such list as well as to persons senior to the junior most person included in the list whose names have not been included in the list. Where the candidates in such list are arranged in their order of preference, appointments to the service shall be made in such order" (Provisos excluded)

108. The above rule signifies that it is only appointments to the State Services alone which are required to be published in the gazette and appointments to posts in Subordinate Services shall be published in the Notice Board of the respective offices. In other words, appointments to State Services alone have to be notified in the gazette and not appointments to the Subordinate Services. There can be no dispute over the fact that the post of B.T. Assistant belongs only to Subordinate Service. State Service with reference to the Tamil Nadu School Educational Services is dealt with under G.O.Ms.No.1053, Education dated 9.6.1978 and it is only the following categories which are classified under Tamil Nadu School Educational Service:-

1. Director of School Education.
2. Joint Directors of School Education.
3. Deputy Directors of School Education.
4. Deputy Directors of Government examinations and Chief Educational Officers.
5. District Educational Officers, Inspectress of Girls Schools, Inspectors of Anglo Indian Schools, Special Officers for School Libraries and Adult Education and Readers in the Research and Training at Madras.
6. Special Officers for Audio Visual Education, Headmasters and Headmistress including in the Modern High Schools.
7. Chief Inspector of Physical Education, Secretary to Director of Government Examination etc.

109. With the result, the post of B.T. Assistants do not fall under the category of state service and hence the P.O in this case does not satisfy requirement No.2.

110. As regards the third requirement, in the case of a Gazetted Officer, the appointing authority and the punishing authority is the Government and this is one of the major features of distinction between Gazetted and Non-Gazetted Officers. In the case of B.T. Assistants, the appointing authority is only the Chief Educational Officer or at the most the Head of the Department. The Government is not the appointing authority. It should also be borne in mind that under Rule 10 of Tamil Nadu Civil Services (Disciplinary Proceedings Tribunal) Rules 1955, it is the Government which shall be the authority to impose penalty in the case of Gazetted Officers. In fact, this issue was dealt with in the case of K.Natarajan vs. The Rural

Development Department reported in 1980 TLNJ Page 302, MOHAN, J., as he then was held that in the case of a Gazetted Officer, it was the Government alone which was the competent authority to impose penalty.

111. It is also pertinent to note that even Officers falling under Group-B are not necessarily State Officers, who could be dealt with only by the Government. A perusal of the annexure to G.O.Ms.No.843 Personnel and Administrative Reforms (M) Department dated 11.7.1977 which has been extracted above will show that it is only the Head of the Department/Collector/the Regional Officer who is the appointing as well as the punishing authority for Group-B and not the Government. Therefore, even Officers falling under Group-B by virtue of their pay scale, are not to be presumed as belonging to the State Service unless and otherwise, the Special Rules governing the particular posts classify the said posts as belonging to State Service. Therefore, the third requirement is also not satisfied by the P.O.

112. As regards the power to attest testimonials, certificates etc., the said power alone cannot be a determinative factor to classify the Officers as Gazetted Officers. A perusal of the various Government Orders issued in the context of authorising different category of Officers to attest testimonials etc., disclose that even nonGovernment Servants are empowered to do so, such as retired Government Officers, Municipal Councillors etc. Rule-33 of the Civil Rules of Practice enables even the Village Administrative Officers, Members of Panchayat Union, Municipal Councillor, MLAs, Mps, Village Magistrate etc., to attest affidavits for use in judicial proceedings. Therefore, vesting of such a power alone cannot be a determinative feature of the status of a Government Servant as a Gazetted Officer. The conferment of such a power is only for the purpose of authentication of the signature of an individual or a document and the said power was once vested with the Gazetted Officers alone at earlier stages. But it has now become diluted and holders of posts in the Subordinate Services and even persons who are not Government Servants are also vested with the said power, for the convenience of the public.

113. Even so, it is seen that B.T. School Assistants were empowered to attest documents and testimonials only by virtue of G.O.Ms.No.14 8 School Education Department, dated 17.9.2002. The said Government Order came to be passed much later than the date of election and hence cannot be relied upon to show that the P.O in this case was authorised to attest documents as on the date of election.

114. In the result, I have no other alternative except to hold that the P.O in this case is not a Gazetted Officer and hence not being one of the categorised officials of the Government under Section 123 (7), I find this issue in favour of the second respondent and against the petitioner.

115. Issue Nos.1 and 5:

Consequent on the findings as above, both the

issues are found against the petitioner.

C O N C L U S I O N

116. The result of the above findings is that even
though on the factual allegations, the second respondent is found guilty of corrupt practice under Section 123 (7) of the Representation of the People Act, of having secured and procured the services of the P.O/Government Servant. However as the P.O in this case, is not one of the officials of the Government as categorised under Section 123 (7) and in view the law laid down by the Supreme Court that the allegation of a corrupt practice under Section 123 (7) has to be restricted only in the context of the officials specified in the said provision, the election petition has to fail and be dismissed. No costs.

117. The result of this election petition is
regrettable. Even though the second respondent is found guilty of the essence of the charge under Section 123 (7) of obtaining and procuring the assistance of a person in Government service, by committing an act which is illegal and the offender would walk into a polling booth and with impunity, pressurise the P.O and vote in the booth knowing fully well that he cannot vote in that booth and yet this Court is powerless to set aside the election. The situation is due to the loophole in the legislation arising out of unrealistic drafting of Section 123 (7), when the Parliament decided to replace the old Section 123 (8) and to restrict the category of Government servants. As I had already mentioned, most of the officials mentioned under Section 123 (7) out of the six categories of officials, have nothing to do with the conduct of the election such as Stipendiary Magistrates and Judges, Members of the armed forces of the Union, Excise Officers etc., who have absolutely no nexus with the process of election. I had dealt with in a detailed manner regarding the nature of the very wide powers and discretion which a P.O exercises over the polling process which makes him a monarch of the polling booths under his control and on him rests the fair conduct of the poll. But he does not find a place in the list of officials under Section 123 (7).
118. There is also no compulsion that only Gazetted
Officer should be appointed as a P.O. If there was such a statutory requirement and yet a Non Gazetted Official is appointed as the P.O., then this Court could invoke de-facto doctrine or the Rule of Necessity. Neither the Act nor the Election Rules contemplate appointing only a Gazetted Officer as the P.O. The discretion to include in Section 123 (7) such other class of Government officials as may be necessary is vested with the executive under Section 123 (7) (g) which has not been exercised by the executive. The executive have failed to notify the Officers who would be most appropriate and relevant in the context of the elections. In this back ground, Judiciary can neither legislate nor perform the functions of the executive to effectively implement Section 123 (7) (g). It is not as though the higher authorities are not aware of the unique position which a P.O holds. In paragraph 3.1 of the Hand Book issued to the Returning Officers it is mentioned that the P.O is required to perform very important functions and that he should as far as possible be a Gazetted Officer and failing which at least a person working in a Supervisory capacity. That being so, it is surprising why the Presiding

Officer is not notified under Section 12 3 (7) (g). Winning an election by illegal means with the blessings of the P.O will be easily possible by appointing officials not being Gazetted Officers and thereby ensure that the issue of corrupt practice under Section 123 (7) cannot be invoked.
119. This Court can only hope and trust that this anomaly is removed at the earliest and the Presiding Officers irrespective of their official status and such other important officials of the election machinery are also included under Section 123 (7).

Index :Yes.
Internet:Yes.

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